UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 364, AFL-CIO,

Charging Party,

Case Nos. 18-CA-264654
18-CA-266951
18-CA-270402

and

ADT, LLC,

Respondent.

RESPONDENT ADT'S POST-HEARING BRIEF

Dated: March 12, 2020

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: _____
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Respondent ADT, LLC ("ADT" or "the Company"), by its attorneys Ogletree, Deakins, Nash, Smoak and Stewart, P.C. and pursuant to Section 102.42 of the National Labor Relations Board's ("the Board's") Rules and Regulations, submits this post-hearing brief to Administrative Law Judge, Michael Rosas ("the ALJ") in connection with the above-captioned proceeding.[1]

International Brotherhood of Electrical Workers, Local No. 364, AFL-CIO ("the Union") filed three (3) separate unfair labor practice charges (Case Nos. 18-CA-264654, 18-CA-266951, and 18-CA-270402) related to the consolidation of two (2) formerly separate ADT facilities (Madison, Wisconsin and Rockford, Illinois) into a single site located in Janesville, Wisconsin. The Union contends that ADT violated Sections 8(a)(1) and 8(a)(5) when it withdrew recognition, and did not bargain with the Union over post-withdrawal changes to terms and conditions of employment. The Union further alleges ADT violated Section 8(a)(1) through interrogation and coercive statements directed at employees. Parallel to these proceedings, Region 18 has an action for Section 10(j) relief pending before the United States District Court for the Western District of Wisconsin. Briefing with respect to the Section 10(j) action is complete.[2]

[1] As a threshold matter, Respondent argues that President Biden's removal of General Counsel Peter Robb without proper cause was unlawful under the National Labor Relations Act ("the Act"). Because of this unlawful removal, anyone acting on behalf of the General Counsel with respect to prosecution of this action is acting *ultra vires*, or without lawful authority to do so. Respondent seeks to dismiss this case because the now-Acting General Counsel's lack of legal authority to prosecute the case renders Region 18 unable to prosecute the case and, therefore, the government cannot carry its burden of proof. In the alternative, Respondent seeks to have this matter and proceeding stayed pending General Counsel Peter Robb's reinstatement or until the taint of his unlawful removal is eliminated. Respondent further explicitly reserves all other related arguments associated with the government's *ultra vires* activities in this matter.

[2] *See* Ex. A, Petitioner's Memorandum of Law in Support of its Petition for Preliminary Injunction Under Section 10(j) of the Act (hereafter referred to as "Memorandum"); Ex. B Respondent's Memorandum of Law in Opposition to the Preliminary Injunction Under Section 10(j) of the NLRA; .Ex. C, Petitioner's Reply to Respondent's Memorandum of Law in Opposition to Preliminary Injunction Under Section 10(j) of the Act (hereafter referred to as " Reply").

I. Statement of the Case

The General Counsel has bungled these proceedings, both before the ALJ and with respect to the corollary Section 10(j) action. This failure traces to two (2) fundamental errors associated with the General Counsel's legal positions.

The Act itself constitutes "primary authority" as all statutes do. The Act mandates that a majority-selected collective bargaining representative must relate to a "unit appropriate for such [collective bargaining purposes]." *See* 29 U.S.C. § 159. Thus, the government bears the burden of identifying at least "an appropriate bargaining unit" (but, not necessarily "the most appropriate bargaining unit."). *See, e.g., Overnite Transportation Co.*, 322 NLRB 723, 723-4 (1996). Put another way, the General Counsel may not simply "skip over" a statutory requirement in an effort to advance his desired outcome. Simply repeating *ad nauseam* the mantras "bargaining history" and "compelling circumstances" does not eliminate 29 U.S.C. § 159's statutory requirement of unit appropriateness.

The Union's original certification in this matter is tied to technicians "employed by the Employer ***at its 510 LaFayette Avenue, Rockford, Illinois facility***." (GCX 2)(emphasis added).[3] The facility no longer exists, and there is no claim that its closure constituted an unlawful or otherwise improper action.

The General Counsel seeks amendment to the certification via administrative action. At least for the moment in this proceeding, the General Counsel requests a unit of those "employed by the Employer at its Janesville, Wisconsin facility, who are regularly assigned to work ***in the service territory of*** Respondent's former Rockford, Illinois facility." (Complaint ¶ 5(a))(emphasis added). This is an utterly meaningless unit description.

[3] The General Counsel exhibits will be identified as "(GCX ___), the Company's exhibits will be identified as "(RX ___)" and citations to the unfair labor practice hearing transcript will be identified as "(Tr. ___)."

A "Rockford service territory" does not exist, nor has it ever existed. The written bargaining history is utterly devoid of any definition of the bargaining unit tied to a "geographic area" or "exclusive work jurisdiction." (GCX 3-10). The wholly undisputed historical evidence likewise conclusively proves that the "Rockford service territory" constitutes a flimsy fiction formulated by the General Counsel. (*See, e.g.*, Tr. 301).

Without question, technicians from ADT's (unionized) Chicago office work in Rockford, as do Madison technicians (all of whom, not coincidentally, happen to hold Illinois licenses). (Tr. 72-3, 301, 422-4). The imaginary "Rockford service territory employees" travel into Iowa, Wisconsin or Minnesota. (Tr. 72-3, 120, 242). This absence of any geographic or jurisdictional boundary proves fatal to the General Counsel's case, particularly given the overwhelming and undeniable community of interest shared by all technicians currently working out of Janesville, Wisconsin.

Undaunted, the General Counsel invites the ALJ to simply ignore a clear statutory dictate and hang a decision on secondary authority bearing no resemblance whatsoever to the facts present here. *ADT*, 355 NLRB 1388, *enfd*. 689 F.3d 628 (6th Cir. 2012)(hereinafter "*ADT (Kalamazoo)"*). That case, unlike this one, centers on a well-defined, contractual and historical geographic/jurisdictional distinction that at all times endowed the bargaining unit at issue with a "separate and distinct" identity. *ADT Kalamazoo*, 355 NLRB at 1397 ("The collective bargaining agreement ***refers to the Kalamazoo 'service territory,' jurisdiction over which the union sought to maintain pursuant to the provision in the contract that provided for notification if employees not assigned to Kalamazoo were sent to work in the territory."***)(emphasis added).

In *ADT (Kalamazoo)*, only "Kalamazoo bargaining unit employees" worked in the specific, contractually defined "Kalamazoo service territory"-- free from intrusion by other technicians and

without any requirement that they work outside their jurisdiction. Here, so-called "Rockford employees" work across at least four (4) states. Here, the so-called "Rockford service territory" has never been recognized as within any group's exclusive purview as illustrated by the work of Chicago, Madison and other technicians in Rockford. The General Counsel's contorted case crumbles under these distinctions.

The General Counsel's filings with the District Court in the Section 10(j) action prove the point. The General Counsel initially urged to the Court to adopt the same amendment currently pressed to the ALJ; specifically, a unit description tied to the "Rockford service territory." *See Petitioner's Proposed Findings of Fact* ¶ 5(g)(proposing unit consisting of those "regularly assigned to work in the service territory of Respondent's former Rockford, Illinois facility.") (*See* Ex. D.).

Of course, "Rockford service territory" defies definition given the absence of any contract clause and the self-evident reality that "Rockford employees" have always worked in Illinois, Wisconsin, Iowa and even Minnesota at times. Essentially conceding this point, the General Counsel was forced to argue a "*de facto*" unit definition. *See Memorandum,* p. 28-9 ("That the distinct geographic work area for the former Rockford employees is defined *de facto*, ***and not contractually***, and that the Union was not notified of ***others working in the Rockford territory, are not material differences***.")(emphasis added).

Here again, the General Counsel's theory fails. A "*de facto*" (or, "being such in effect though not formally recognized") territory cannot exist where no one—not the Company, the Union or the employees at issue—has ever adhered (formally or informally) to its boundaries. Even if a "*de facto* territory," were it to exist, merits protection from routine and unquestioned intrusion by technicians from Chicago, Madison and other locales. (Tr. 72-3). Even a "*de facto*

territory" adheres to some identifiable boundary or limitation. Yet, the General Counsel concedes the total absence of "defined boundaries serviced by the Rockford facility." *Memorandum*, p. 9.

Tellingly, the General Counsel's original theory of a "Rockford service territory" proves so indefensible that even the General Counsel has abandoned the notion. Apparently recognizing that the jurisdictional lifeline present in *ADT (Kalamazoo)* simply does not exist here, the General Counsel resorted to an alternate approach:

> Should the Court be troubled by the modification of the unit description [based on a definition of "territory"], Petitioner suggest that a unit description consisting of "all full-time and regular part-time installers, technicians and service personnel ***formerly employed by the Employer at its Rockford, Illinois facility***. . ."

While the General Counsel proposes this modification "for injunction purposes" and hopes the Board will later "modify" it, the General Counsel's ever-shifting position speaks volumes.

The Rockford facility, without dispute, is closed. There is no reason to believe it will ever reopen. Only a limited number of "former Rockford employees" remain (approximately four (4) or five (5)). The General Counsel's most-recent proposed unit, therefore, can never be replenished or replaced because its very definition hinges on a discrete number of individuals who may claim "ex-Rockford" status. No future employee or new-hire can ever join the General Counsel's gerrymandered unit because no such individual will have worked out of the now defunct "Rockford facility." This inevitable conclusion flows directly from the General Counsel's misguided and unlawful attempt to resuscitate a dead and now clearly inappropriate bargaining unit. Only one potentially appropriate bargaining unit exists in this matter—eligible employees working out of the Company's Janesville facility. The statutory framework and Board precedent compel this result. Even the Union, obviously, is aware of this reality. (GCX Ex. 12)(Union

representation petition seeking "wall-to-wall" Janesville bargaining unit). For all of these reasons, the Complaint(s)[4] must be dismissed in its entirety.

II. Pertinent Facts Involving Withdrawal and Alleged Unilateral Changes

A. The Union's Certification and Subsequent Bargaining History.

In 1994, the Union won a representation election involving Company employees working out of a Rockford, Illinois office. (GCX 2). The Board certified the Union as the exclusive bargaining representative for the following unit:

> All full-time and regular part-time installers, technicians and service personnel employed by the Employer ***at its 510 LaFayette Avenue, Rockford, Illinois facility***; but excluding all other office clerical employees, professional employees, guards and supervisors as defined by the Act, and all other employees.

(emphasis added). The Union's certification as representative, therefore, is expressly and explicitly linked to the presence of a physical facility in Rockford, Illinois.

Subsequently, the Company and the Union agreed to a series of successive collective-bargaining agreements. (GCX 3-10). The most recent and final collective-bargaining agreement was effective by its terms from September 1, 2017 through August 31, 2020. (GCX 3). This agreement and each of its predecessors includes a "recognition clause" reflecting the original certification. (GCX 3) ("The Employer hereby recognizes the Union as the exclusive collective bargaining representative . . . for whom the Union was certified by the National Labor Relations Board on October 24, 1994 in Case # 33-RC-3943."). All relevant "bargaining history" ties directly back to the original certification and its focus on the Rockford facility. (GCX 3-10).

Significantly, and despite many cycles of negotiations, the Parties never opted to define the bargaining unit in any terms other than those employed at the Rockford facility. (*See, e.g.,*

[4] The Company notes that the General Counsel has filed two separate Complaints in this matter. For sake of ease, ADT will simply call both Complaints as "Complaint" throughout.

GCX 3). The contractual relationship is utterly devoid of any definition of the bargaining unit related to "geographic area" or "exclusive work jurisdiction." (GCX 3-10). The contract history likewise never defines the bargaining unit in terms of specialized work performed or any other criteria beyond the physical Rockford office. (GCX 3-10).

B. Servicing of Northern Illinois Following the Certification.

Due to this bargaining history, the "Rockford unit" was not the only employee group working in the "Rockford area" over multiple decades. (Tr. 72-3). The Rockford group, likewise, has never been limited or confined to work in the Rockford area, the State of Illinois or any other region. Multiple witnesses consistently confirmed these inescapable facts.

Union Assistant Business Manager, Larry Rowlett ("Rowlett") explained, "The way ADT works, there is times where, you know, the ***Chicago*** office might come to the ***Rockford*** jurisdiction on occasion. Our ***Rockford*** group might go into the ***Madison*** area and do the same for the ***Madison*** ADT unit." (Tr. 72-3) (emphasis added). Former Rockford technician, Danny Sissum ("Sissum") acknowledged he "might get sent to ***Iowa***" and "might get sent to ***Beloit, Wisconsin***." (Tr. 120) (emphasis added). Former Rockford technician, David Anderson ("Anderson") described working "wherever I was required" including multiple sites in Wisconsin such as "***Janesville***, ***Madison***, ***Fond du Lac***, ***Fort Atkinson***." (Tr. 242)(emphasis added). Anderson further testified:

> Q. And at that time [when both Rockford and Madison offices were open] there were no defined territorial boundaries, were there?
>
> A. There are—***no***.
>
> Q. And there are still no territorial boundaries today, are there?
>
> A. No. ***There are no lines***.
>
> Q. You could end up in Wisconsin some days, right?
>
> A. ***Yes***.

Q. And the Madison folks could end up – the former Madison folks could end up in Illinois?

A. If certified [licensed],[5] ***yes***.

(Tr. 301)(emphasis added). Company witness, James Nixdorf ("Nixdorf"), likewise confirmed the absence of jurisdictional or geographic boundaries as well as the substantial overlap between multiple employee groups (Rockford, Madison, Chicago, *etc*.). (Tr. 422-4).

C. Pre-Merger Operations.

For many years leading up to the pertinent events, the Company maintained two (2) separate brick-and-mortar operations in Rockford, Illinois and Madison, Wisconsin. (Tr. 114). Each facility contained its own accommodations for service and support personnel. (Tr. 183). Rockford housed its own, separate parts storage and clerical/support staff offices. (Tr. 183). The Madison facility, likewise, contained its own parts and office spaces. (Tr. 183). While the Union represented employees at the Rockford location, the Madison facility was non-union. (Tr. 393-5).

D. The Union's Normal Operations.

By its own admission, the Union's normal "coverage area" does not extend into Wisconsin. (Tr. 39). Instead, the Union services nine (9) northwest Illinois counties (including Winnebago, Stephenson, Jo Daviess, Carroll, Lee, Whiteside and DeKalb). (Tr. 39). Janesville, Wisconsin, therefore, stands "out of [the union's] area" of standard operations. (Tr. 56).

E. The Company Relocates/Consolidates for Lawful, Legitimate Business Reasons.

In February 2019, the Company's real estate department examined the potential consolidation of the Rockford and Madison locations into a new facility located in Janesville, Wisconsin. (RX 5). Janesville represents the "half way point" between the two legacy Company

[5] The state of Illinois requires a certification for technicians to operate in the state. Former Madison Facility employees had such certifications so that they could operate beyond the scope of Wisconsin.

offices. (RX 5). In addition to substantial savings and efficiency gains, the new Janesville office allowed the Company to "easily be able to service ***all zip codes*** from a central location." (RX 5, p 1; Tr. 408)(emphasis added).

The Company announced the move in a May 22, 2019, communication to all Rockford and Madison personnel (both technicians and sales/support staff). (GCX 11). On July 23, 2019, the Company sent a second memorandum to all Rockford and Madison personnel regarding the impending Janesville relocation/consolidation. (RX 3).

There is no claim (or even suggestion) that the Janesville consolidation was unlawful or otherwise improper. There is no claim (or even suggestion) that the move had anything to do with the Union, unions generally or any considerations other than legitimate business efficiencies.

Significantly, the Union never demanded or requested "effects bargaining" over the closure of Rockford or the move to Janesville. (Tr. 71-2; 413-5). Had the Union done so, the Company stood ready and willing to fulfill any and all bargaining obligations. (Tr. 413-5; 417).

F. The Rockford Facility Closes and Employees Move to Janesville.

The Janesville operation did not become fully-operational or fully-staffed overnight. Rather, the move to Janesville involved a transition period.

In approximately September 2019, the Rockford facility permanently closed and its personnel relocated to a temporary Janesville location. (Tr. 75). Five (5) Rockford technicians and certain support staff worked out of the temporary facility until approximately the start of 2020. (Tr. 101). The Madison office remained operational during this period.

At the beginning of 2020, the permanent Janesville location opened and those relocating from Madison (both service technicians and support personnel) joined those who had been working from the temporary space. (Tr. 103).

G. The Rockford and Madison Groups Fully Integrate into Janesville.

Once the permanent Janesville facility opened, the former Rockford and Madison service and install technicians worked from the same location, performed the same work, engaged with the same support team, and answered to an identical supervisory chain-of-command. (Tr. 73-4, 81, 117, 123, 192-3, 201). Not surprisingly, the new Janesville facility became the hub (pre-pandemic) for any employee workplace discussions regarding discipline, pay disputes or operations. (Tr. 202, 290-1).

Despite the General Counsel's substantial efforts to obfuscate the facts, the former Rockford witnesses admitted that they saw and interacted with the former Madison group "more regularly" and at an "increased" level once both groups arrived in Janesville. (Tr. 140, 307). The two formerly separate groups performed identical work, drove the same trucks, used the same tools/equipment and reported to the same managers. (Tr. 307). They held themselves out to the public with the same uniforms as a single unit. (Tr. 311). And, of course, they continued to work without regard to any artificial or imagined geographic boundary or jurisdiction. (Tr. 307).

The "face-to-face" interaction between the Madison and Rockford groups also spiked once the Janesville facility opened. The technicians attended the same "welcome breakfast" with other support personnel in early 2020. (Tr. 143-4). The two formerly separate groups attended "live" training sessions together, in the same room. (Tr. 143-4). All former Madison and Rockford employees physically attended new product sessions together in Janesville. (Tr. 144). In short, all operational and social gatherings of any sort (for both service technicians and support staff) became fully integrated upon Janesville's opening. (Tr. 199).

On this point, the government disingenuously argued before the District Court (and, presumably will do so again before the ALJ) that the former Rockford and Madison groups only

"had about two in-person training sessions at the new facility" (*Memorandum*, p. 12).[6] In its reply brief, the General Counsel moves even farther out on the ledge claiming "a lack of integration" between Rockford and Madison post-Janesville consolidation. (*Reply*, p. 7). As an evidentiary matter, these assertions fail.

The General Counsel's witnesses admit that from the beginning of 2020 up to the move to pandemic-required "virtual meetings," the two groups were combined as to any and all gatherings:

> Q. And, to the extent there is a manager meeting with service personnel, including both Madison and Rockford, ***those were all combined meetings leading up to today***, correct?
>
> A. ***Yes***.

(Tr. 196)(emphasis added); *see also* (Tr. 197)(admission that groups were meeting together as of April 2020 and continued to do so after onset of pandemic); (Tr. 204). They admit that the level of Madison and Rockford interaction post-Janesville ***matches Rockford only*** interaction while Rockford was open:

> Q. In other words, you see the guys from Madison with [sic] ***about the same as you saw the guys from Rockford when Rockford was open, right***?
>
> A. ***Yes***.

(Tr. 204)(emphasis added). The combined meetings were frequent enough that Union Assistant Business Manager, Larry Rowlett was fully aware of them:

> Q. Well, do you know whether there were times when the Rockford group as you called it attended the same meeting as the Madison employees did?

[6] The General Counsel appears to base this claim solely on Rockford employee/union supporter Danny Sissum's response to "Can you think of any other instances other than the breakfast and the training [where] Madison and Rockford were together?" Sissum replied, "No. I cannot. The building has been pretty much closed since the virus began." (Tr. 145).

Obviously, Sissum's "inability to recall" does not detract from the clear record evidence of increased interaction and integration. It simply underscores the limits of Sissum's memory. The government's resort to this tactic is similar to its other bizarre evidentiary arguments advanced before the District Court. (*See, e.g., Memorandum*, p. 26)(urging Court to ignore testimony on cross-examination where those admissions are "undercut" by the same witness's direct testimony).

A. Yes. Yes.

(Tr. 79). The former Rockford technicians indisputably see the former Madison employees more regularly than before the Janesville consolidation.

Q. [Y]ou see the Madison techs more frequently than you used to in their two offices, right?

A. More regularly, yes. Yes.

(Tr. 307). Put simply, the General Counsel's arguments regarding an alleged lack of integration cannot withstand the admissions contained in the record.

As a practical matter, the government's arguments attempt to use the COVID-19 pandemic to detract from the clear integration of the Rockford and Madison groups. The government's own witnesses confirmed that the increased "face-to-face" interactions between the two (2) groups stalled solely because the Janesville facility "has pretty much been closed since the virus began." (Tr. 145). Even after the pandemic began, however, all Janesville service technicians (both former Rockford and Madison) operated as a single integrated group performing identical functions. Upon the "shift to virtual," both groups continued to attend the same meetings as one entity. (Tr. 304). But for the virus, the government's "Rockford" witnesses would expect workplace matters to be discussed in Janesville and further admitted that the "ex-Madison technicians" share the same expectation. (Tr. 309).

Before the District Court, the General Counsel attempted yet another evidentiary bait-and-switch (likely to be repeated here) with respect to post-pandemic virtual meetings. (*Reply*, p. 6). The General Counsel argued, in direct contravention of the record evidence, that virtual meetings involving all Janesville employees should be discounted because those "meetings were attended by all facilities under General Manager Gary Talma's management, including those in Milwaukee,

Minnesota and possibly Iowa." (*Reply*, p. 6-7). This gross distortion simply cannot stand. It is true that the record contains certain meetings organized and run by Talma involving multiple locations. (*See, e.g*., RX 8, p. 14)(Tech Improvement Call "organized" by Talma and indicating nineteen (19) invitations accepted, a number that exceeds the Janesville workforce of approximately ten (10) technicians). The General Counsel simply ignores, however, the far larger number of virtual meetings involving ***only*** Janesville technicians (both Madison and Rockford and numbering approximately ten (10) employees) organized by direct supervisor, Ides (***not Talma***). (*See* RX 8, p. 1-6, 8, 18, 22). As to these far more frequent Janesville only sessions, Talma's attendance is explicitly noted as "***Optional***." (*See, e.g*., RX p. 1, 3).

The General Counsel cannot evade the overwhelming evidence of integration, and should not be permitted to use the pandemic as a crutch for the manifest and manifold shortcomings associated with his evidentiary presentation.

H. The Union Seeks to Represent All Janesville Technicians.

On May 8, 2020, the Union filed a representation petition with Region 18 of the NLRB. (GCX 12). The petition sought a "wall-to-wall" Janesville unit including all "service technicians, lead install technicians, lead service technicians, service technician trainees [and] install technician trainees" working out of Janesville. (GCX 12). The total "number of employees" sought by the Union amounted to eleven (11), only five (5) of whom formerly worked from Rockford. (GCX 12). The petition signed by the Union notes: "Willful false statements on this petition can by punished by fine and imprisonment." (GCX 12).

When a union files a petition, the NLRB requires employers to post a "Notice to Employees" alerting the employees to the filing. For this reason (among others), the Union's claim to "all Janesville technicians" was no secret to the Janesville workforce. (Tr. 198, 443).

Leading up to the petition, the Union conducted an investigation into its level of support in Janesville. (Tr. 312). This effort included individual meetings with at least some portion of the Janesville workforce. (Tr. 312).

Bradley Williams ("Williams"), the Union's organizer, agreed that "Generally, where employees perform the same work, in the same place, that typically constitute[s] an appropriate bargaining unit." (Tr. 392). When the Union petitioned for Janesville, it estimated that the eleven (11) voters included "six (6) members of ours" and "five (5) on the non-signatory side" (referring to the former Madison workers or new hires). (Tr. 393, 395). Put another way, the Union projected that it enjoyed majority support when filing the petition. (Tr. 393, 395). In fact, Williams' log includes a May 4, 2020, entry noting that he had "confirmed our 6 to 5 majority." (RX 1).

Williams "election projection" proved erroneous. (RX 1). On May 15, 2020, Williams made the following log entry:

> ADT shifted employee [redacted] to Brookfield ***making RC petition a 5 on 5 campaign***. We withdrew our petition ***at this time***. We will approach the non-signatory branch of this unit and see if we can grab one member for our side. Working with SOC Laskonius on the ***next phase of this***.

(RX 1)(emphasis added).

To recap and put plainly what the General Counsel attempts so desperately to conceal, the state of affairs between the Janesville service technicians and the Union as of May 15, 2020 involves the following undisputed facts:

1. The former Rockford (union) and Madison (non-union) service technicians are clearly working as a single, integrated unit out of the now shared Janesville facility.

2. The combined Janesville unit, as evidenced by the Union's own petition and inescapable reality, constitutes the only viable "appropriate unit" given the merger and integration.

3. Cognizant of this reality, the Union has filed a representation petition seeking the entire facility but under the mistaken belief that it had any election "in the bag."

4. The existence of the petition and the Union's claim on all of Janesville is clearly known to all employees— including the former Rockford employees, the former Madison employees and new hires.

5. After making public its intention to claim all of Janesville, the Union withdrew the petition due to a political miscalculation. The Union cannot "un-ring the bell," however, as employees are aware of its activities.

6. The Union has not "given up" on claiming to represent all of Janesville but, instead, was actively seeking "one more vote" and approaching "non-signatory" (that is, former Madison employees or new hires) for support.

Up to this juncture, there is no claim or suggestion that the Company has committed any unlawful act with respect to the Janesville facility or any Janesville-based employee.

I. Other Activities Surrounding the Petition.

Having been "put in play" by the Union's petition, certain Janesville employees apparently took action. Government witness and former Rockford employee/Union member Anderson candidly admitted that he holds a "vested interest" in the Union's continued presence in Janesville. (Tr. 288). So motivated, Anderson caught wind of a "decertification effort" and took it upon himself to conduct some "on-line research." (Tr. 298).

Anderson then, of his own accord, initiated a conversation with a former Madison employee whom Anderson suspected of having involvement in the decertification effort. (Tr. 298). Anderson acknowledged he was acting on his own accord, and not at the behest of the Company. (Tr. 292-3). Anderson's investigation ultimately confirmed that the Company was not "behind" the decertification push. (Tr. 293-4).

Union organizer Williams was similarly aware that the decertification effort flowed directly from the Union's botched petition, and not from any Company action/influence. Williams' log includes an entry dated September 15, 2020: "Spoke with [redacted] he stated the move to

decert was tech motivated he wouldn't say which tech but they all signed ***did not come from management. He says no replacement yet for [redacted] but interviews have been done***." (RX 1, p. 2)(emphasis added). The Union's own document establishes that the Company had nothing to do with the Janesville employees' union sentiments. (RX 1, p. 2). Williams' reference to a "replacement," moreover, confirms the Union was still seeking the "missing vote" needed to claim all of Janesville. (RX 1, p. 2).

J. The Decertification Petition.

Within a week (judging by the signatures) of the Union's "withdrawal" of its petition and while the Union's attempt to find "one more vote" at Janesville was ongoing, certain Janesville employees engaged in a decertification effort. (GCX 14). Between May 20, 2020 and June 4, 2020, six (6) Janesville technicians signed the decertification petition. (GCX 14). This number represented the majority of the Janesville service workforce. (Tr. 431).

Nixdorf, ADT"s Director of Labor Relations, reviewed the petition and determined that its signatures were in fact authentic. (Tr. 431; RX 2). Nixdorf further recognized that the signatures constituted a majority. (Tr. 432).

As a result, Nixdorf forwarded a June 22, 2020, letter to the Union alerting it to the decertification. (GCX 15). Notably, Nixdorf's letter ***did not*** immediately withdraw recognition. (GCX 15). Instead and consistent with applicable NLRB precedent, Nixdorf wrote: "The current collective bargaining agreement is set to expire on August 31, 2020. Absent credible objective evidence the union maintains support of the majority of employees in the bargaining unit in Janesville, WI, ADT will withdraw recognition ***at the expiration of such agreement***." *Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019) (if an employer has announced its intent to withdraw recognition, the union may attempt to reestablish majority status by filing a representation petition within 45 days from the date the employer gives anticipatory notice of the

withdrawal of recognition). In other words, the Company's June 22, 2020, letter put the Union on notice of the need to establish majority support within the applicable legal window. Only at the expiration of that window (absent a showing of required majority status), would the Company withdraw recognition.

The Union failed to establish majority support and, instead, these proceedings ensued.

K. June 22, 2020 to August 31, 2020 and Subsequent Changes.

As noted above, the Union had full and ample lawful opportunity to establish majority status at any time between June 22 and August 31, 2020. It failed to do so. Instead, after a prolonged period and with approximately two (2) weeks remaining prior to the labor contract's expiration, the Union filed its first unfair labor practice charge. That charge lead to these proceedings and the General Counsel's bureaucratic contortions seeking to maintain a minority union in an inappropriate bargaining unit.

Finally, the Complaint alleges a series of supposed "unilateral changes" to wages and working conditions. (Complaint ¶ 7(a)-(f)). There is no evidence that any of these changes were initiated prior to the Company's lawful withdrawal of Union recognition. Because the Union had clearly lost majority status at the time of any change, these allegations fail.

III. Summary of the Argument and Applicable Legal Framework

In order to prevail, the General Counsel must establish that the legacy Rockford bargaining unit "maintained its integrity" notwithstanding the Janesville consolidation and its now shared interests with other Janesville technicians doing identical work in the same place. Phrased differently, the General Counsel must make a threshold showing that an "ex-Rockford only" group somehow constitutes at least "an appropriate bargaining unit." *Overnite*, 322 NLRB at 723-4. The General Counsel simply cannot satisfy this statutory requirement under any reasoned analysis. *See* 29 U.S.C. § 159.

The Board has long held single-site bargaining units (such as Janesville) presumptively appropriate. *See, e.g., J&L Plate, Inc*., 310 NLRB 429 (1993). The presumption recognizes the industrial reality that employees at the same facility typically share a community of interest sufficient to "justify their mutual inclusion in a single bargaining unit." *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 610 (1991).

"Gerrymandering" bargaining units, such as attempted by the General Counsel here, poses a significant threat to collective bargaining. *PCC Structurals,* 365 NLRB No. 160 at *6 (Dec. 15, 2017)(employees' interest must be "sufficiently distinct" from those excluded from unit to ensure that "bargaining units do not become arbitrary, irrational or 'fractured'"—that is, composed of gerrymandered groups of employees whose interests are insufficiently distinct from those of other employees to constitute that group a separate appropriate unit."). Bargaining history has significance but cannot (standing alone) justify illogical or misguided division of employees who otherwise share a community of interest. *See, e.g., Turner Industries Group, Inc*., 374 NLRB 428, 430 (2007)(the weight given to a prior history of collective bargaining is "substantial" but not "conclusive"); *see also Crown Zellerbach Corp*., 246 NLRB 202, 203 (1979)(the Board "will not adhere to the historical bargaining unit in situations where that unit does not 'conform reasonably well to other standards of appropriateness.'"). In other words, even a substantial bargaining history does not obviate the statutory mandate of an "appropriate" bargaining unit.

The General Counsel here invites the ALJ "revise" or "impose new terms" that wholly conflict with the bargaining history, past practice and the parties' mutual understandings developed over many years. *See generally, H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)(one of the fundamental policies of the Act is freedom of contract and the Act does not permit the Board to compel agreement between the parties). As fully detailed herein, there has never been a "Rockford

service territory." No Board certification, collective-bargaining agreement, past practice or any other authority whatsoever exist which might serve as a foundation for the General Counsel's desired result in this matter. To succeed, therefore, the General Counsel must concoct a jurisdictional claim from whole cloth.

Significantly, the Board has only rarely granted the type of amendment sought here and every such case involved unique facts wholly absent. For instance, the Board has embarked on an amendment where a subset of employees at a single facility had a specialized skill justifying a unique and separate unit. *Comar, Inc*., 339 NLRB 903 (2003). The employees at issue here, by contrast, "do the exact same thing." (Tr. 73-5, 208-9).

An employer's failure to engage in effects bargaining that might have resulted in distinct employment terms has been deemed sufficient to permit "gerrymandering" of similar employees at a single site. *Dodge of Naperville v. NLRB,* 739 F.3d 31, 40-1 (D.C. Cir. 2015)(permitting post-consolidation legacy union to remain due to employer's failure to satisfy effects bargaining obligation). Here, the Union admits that it never requested negotiations with respect to the closure of Rockford, Janesville's opening or the merger with Madison. (Tr. 71-2, 413-5).

Finally, in *ADT (Kalamazoo),* the Board relied on a clearly defined, contractually specified and historically adhered to "exclusive work jurisdiction" to justify continued viability of an appropriate unit with separate integrity. 355 NLRB at 138. No basis for a finding of "exclusive geographic control" exists in this matter.

The General Counsel's proposed, gerrymandered unit is based solely on a non-existent geographic boundary (or, alternatively, based upon prior service at a defunct facility). The ALJ should reject the invitation to bless as "appropriate" such an illogical and absurd unit. *See Dodge of Naperville*, 739 F.3d at 40-1 (instructively noting that permitting a legacy unionized workforce

to exist side-by-side with non-union personnel performing similar work "gives us pause" and "is a tougher call" and "our decision is based upon these particular facts" and "it may turn out that [the employer's] withdrawal of recognition was simply premature").

IV. Analysis: Withdrawal of Recognition and Alleged Unilateral Changes

A. The Former Rockford Employees Cannot Constitute a "Stand Alone" Unit.

Contrary to the General Counsel's confused position, the test here is ***not*** whether certain aspects of the former Rockford group's employment terms remained unchanged after the Janesville consolidation. (*Memorandum,* p. 20)(suggesting continuing "to perform the same work in the same geographic area under largely unchanged terms and conditions of employment" somehow justifies a gerrymandered unit within a single facility). Instead, the General Counsel must establish that the ex-Rockford technicians' working conditions maintained separate "integrity from" or "remained distinct from" other employees working from the Janesville facility. *See, e.g., NLRB v. ADT Security Services*, 689 F.3d 628, 635 (6th Cir. 2012); *see also Ramada Inns, Inc*., 278 NLRB 691 (1986)(in light of changed circumstances, earlier unit determination of separate units not binding; one overall unit found only appropriate unit); *Renaissance Center Partnership*, 239 NLRB 1247 (1979)(holding consolidation of workforce rendered earlier certified unit of one of the groups inappropriate). The General Counsel has not and cannot meet this burden.

And as stated by an Administrative Law Judge, and affirmed by the Board in *Kelly Business Furniture, Inc*., 288 NLRB 474, 478 (1988), a case in which the Board upheld an employer's withdrawal of recognition in certified unit because the unit ceased to exist after a consolidating of operations:

> It is implicit in the General Counsel's position, however (indeed I regard it as axiomatic) that the complaint must be dismissed if "the Unit" proposed in the complaint cannot be found to be independently appropriate by the application of any traditional tests. And it is at this stage of the analysis that the General Counsel's case

> loses steam and begins to flounder. Thus, although the General Counsel has paid lip service to the fundamental requirement that his proposed unit be one that is independently appropriate, he has not called to my attention a single case in which the Bard has carved up a single-facility warehousing and delivery operation such as this one so as to create a unit in which only *some* of the inside warehousing personnel are included and only *some* of the outside delivery/installation personal are included. In the circumstances, I take this as an implicit concession by the General Counsel that his proposed unit is so irregular as to be inappropriate by any standard definition and that his litigation position really implies, at bottom, that the Board should bend the rules for determining appropriate units so as not to "deprive" the systems employees of collection representation only 5 months after they have voted in the union.

The former Rockford and Madison technicians "do the exact same thing" with respect to the installation and servicing of security systems. (Tr. 73-5, 208-9). They perform this work out of the same location. (Tr. 81). They drive the same trucks, and wear the same uniforms. (Tr. 74, 311). They hold themselves out to the public in identical fashion. (Tr. 311). They share the same supervisors and communicate with those supervisors multiple times per day. (Tr. 74, 81, 115, 117, 201, 237). Both pre and post-pandemic, they attend the same operations, product and training sessions. (Tr. 79-80, 143-5, 195-6). They interact with one other and that interaction increased (pandemic noted) upon Janesville's opening. (Tr. 140). They share, rely upon and interact with the same Janesville-based support staff. (Tr. 183-5, 192, 303). Tellingly and unlike the pre-merger situation, both the former Rockford and Madison employees are aware of promotions, demotions and departures involving their fellow Janesville employees. (Tr. 189-90). They share the same required licensure for work performed in Illinois. (Tr. 420-1; RX 6). They all expect that workplace issues will be discussed and adjudicated out of the Janesville facility. (Tr. 202, 290-1). Indeed, the government largely concedes (as it must) all of these realities. (Memorandum, p. 24)(no dispute employees do the same thing under same supervision under same roof).

There is simply no legal or practical basis for insisting that the Company ignore all of these realities and treat the former Rockford technicians as some sort of free-floating separate unit. Again, even the General Counsel has yet to settle on a single, consistent definition as to the scope of and basis for such a unit. As the Board stated in *Kelly Business Furniture*, 288 NLRB at 478, there is "no precedent for such an approach. And it simply begs the question to maintain, as the General Counsel seems to do, that employees in a unit previously certified as appropriate continue to comprise a separate, appropriate unit when their job tasks continue to be roughly the same in a consolidated operation as they were when the unit was originally certified at a separate location." A desire to recognize bargaining history, without more, cannot justify an inappropriate unit.

In fact, the General Counsel's position here completely conflicts with a number of unit certifications/voting units previously approved with respect to the Company. *See, e.g.*, 18-RC-266144 (2020)(employees employed at Des Moines, Iowa service ***facility***); 04-RC-187141 (2016)(technicians, installers and material handlers at the Horsham, PA and Mount Laurel, NJ ***facilities***); 25-RC-171369 (2016)(technicians at Davenport, IA ***facility***); 19-RC-168200 (2016)(technicians at Beaverton, OR ***facility***); 18-RC-132863 (2014)(technicians at Madison, WI ***facility***)(emphasis added). In each instance, the "facility" was central to the appropriate unit, and the General Counsel presents no valid reason for extending different treatment to the Janesville location.

B. The Government's Precedent Is Inapposite.

Fully aware that the Janesville technicians share an overwhelming community of interest so as to constitute the only viable appropriate unit, the General Counsel attempts to pigeon hole these facts into a readily distinguishable case. The Regional Director boldly proclaims that *ADT (Kalamazoo)* "controls the instant case." (Tr. 29). Contrary to this pronouncement, any similarity between that case and the facts present here ends with the case title.

In *ADT (Kalamazoo)*, the relevant bargaining history involved a labor contract that explicitly defined the bargaining unit's "work jurisdiction." 355 NLRB at 1397 ("The collective bargaining agreement refers to the Kalamazoo 'service territory,***' jurisdiction over which the union sought to maintain pursuant to the provision in the contract that provided for notification if employees not assigned to Kalamazoo were sent to work in that territory***."")(emphasis added). The contractual boundary remained intact both before and after the consolidation of the Kalamazoo employees with the another employee group. *Id.* at 1388 ("The previous collective bargaining agreement referred to the Kalamazoo 'service territory,' and, even after the closure of the Kalamazoo facility, the Kalamazoo employees continued to be assigned work in that territory."). Put another way, the Kalamazoo union had an established, historical and contractually-defined "exclusive claim" to a particular geographic area.

No such "exclusive jurisdiction" has ever existed in this case. The "Rockford group" works in Illinois, Wisconsin and as far out as Iowa or Minnesota. Employees from the Chicago office or other locations likewise service the supposed "Rockford area." The Madison technicians, both pre and post-merger, hold the licenses necessary to perform security work in Illinois, and have performed work in alike regions. (Tr. 72-3, 89, 209, 242, 288, 301). Indeed, the Regional Director concedes the total absence of "defined boundaries serviced by the Rockford facility." (*Memorandum*, p. 9).

1. The ALJ Should Not Amend the Certification/Contract Based on a Wholly Non-Descript, "De Facto" Work Jurisdiction Theory.

Notwithstanding the clear difference between *ADT (Kalamazoo)* and this matter, the General Counsel may urge the ALJ to impose a "*de facto* defined Rockford territory." (*Memorandum*, p. 20). The government raised the following argument before the District Court, "That the distinct geographic work area for the former Rockford employees is defined *de facto,* ***and***

not contractually, and that the Union was not notified of others working in the Rockford territory, are ***not material differences***." (Memorandum, p. 28-9)(emphasis added). In point of fact, the differences are not only material, they are decisive.

Once again, the original NLRB certification of the Union is expressly tied to a "Rockford facility." No such facility currently exists, having been replaced with the Janesville operation. Similarly, the Rockford unit has never enjoyed any jurisdictional or exclusive geographic claim.

Unlike the facts in *ADT (Kalamazoo),* the ALJ cannot rely upon a contractual definition of "jurisdiction" or a precise map of "geographic control" should he accept the General Counsel's invitation to amend the bargaining unit. *Compare ADT (Kalamazoo),* 689 F.3d at 636 (even post-consolidation, Company distinguished between service areas and assigned only Kalamazoo servicemen to work in a specific subdivision of the Kalamazoo service territory as delineated by a color-coded map).

Here, the General Counsel has not and cannot establish any similarly clear "jurisdictional boundary" that might possibly preserve the Rockford unit's separate integrity. This failing, and the associated realities, is fatal to the government's case.

The record is clear that multiple employee groups routinely entered the imaginary "Rockford service territory" over many contract cycles. The "Rockford work" was performed not only by the non-union Madison technicians, but also by other unionized locations based in Chicago and elsewhere. By the same token, the "Rockford employees" worked in states such as Iowa, Wisconsin and Minnesota notwithstanding the imaginary "*de facto* territory."

These undisputed facts raise questions the General Counsel simply has not (and cannot) answer. Is the Board now to amend and police a contract in a fashion that forbids licensed former Madison technicians from performing work in Illinois? Is the (unionized) Chicago facility now

magically "prohibited" from entering a "Rockford territory" which the government is to create without any historical or contractual guidance or basis? May the former Rockford employees refuse to report to the Janesville office as "outside their jurisdictional area?" May they decline the "non-Rockford work" (Wisconsin, Iowa, Minnesota, *etc*.) under this contorted theory? Finally, when newly-created "Rockford territory" bargaining unit suffers attrition or a decrease in numbers, are those positions to be filled or shall the bargaining unit simply dissipate over time? On what basis? This is but a preview of a myriad of unresolvable questions to flow from the General Counsel's misguided attempt to gerrymander a minority union back into existence.

Beyond this "preview" lurk more fundamental questions the General Counsel blithely ignores. Under this theory, the "ex-Rockford only" technicians would work side-by-side, out of the same Janesville location, as other non-union technicians whose work would presumably replace the "ex-Rockford" crew in the event of a strike. In the event of a lockout, and as a result of the General Counsel's inane approach, the Company presumably could operate Janesville with the former Madison contingent while engaged in economic warfare directed at "ex-Rockford" alone. This result, of course, would turn applicable precedent on its head. *See, e.g., Electrical Workers Local 15 v. NLRB*, 429 F.3d 651, 662 (7th Cir. 2003)("partial lockout" involving same workforce impermissible as "inherently destructive" of union's representational role and employee rights).

For all of these reasons, the General Counsel's proposed unit should be deemed inappropriate.

2. The Government's Remaining Arguments Cannot Sustain the Complaint.

Having disposed of the General Counsel's lynchpin "geographic distinctness" argument, two (2) other contentions remain.

The government incorrectly claims a lack of evidence regarding the comparative wage rates of the former Madison and Rockford groups. (*Memorandum*, p. 24). The undisputed evidence

establishes that both groups shared the same wage rates both before and after the opening of Janesville. (Tr. 425-7; RX 7). This fact, obviously, further differentiates this matter from the General Counsel's cited precedent. *Compare ADT (Kalamazoo),* 689 F.3d at 636 (noting that even after consolidation the "Kalamazoo servicemen [received] a lower hourly rate and piece rate based on a discernable labor market in the Kalamazoo service territory") *and* 355 NLRB at 1388 (Kalamazoo technicians paid less because "both the location of their work and the resulting wage rates remain distinct").[7]

Finally, the government's witnesses, with collective experience at the Rockford facility of approximately eight (8) years, mustered a whopping total of four (4) examples of "call out" occurrences. Obviously, these rare occurrences fall woefully short of overcoming the otherwise overwhelming community of interest shared by the former Rockford and Madison technicians. (Tr. 96, 128, 249).

3. Unilateral Change Allegations.

The Complaint alleges various alleged "unilateral changes." (Complaint ¶ 7(a-f)). No evidence suggests that any of these changes took place prior to the withdrawal of recognition. For this reason, all unilateral change allegations fail.

A unilateral change allegation requires the presence of an appropriate bargaining unit and a majority-selected bargaining representative, neither of which exist here. *See generally, NLRB v. Katz,* 369 U.S. 736, 743 (1962). Here, the Company withdrew recognition as of August 31, 2020 and was thereby absolved of any obligation to bargain with the Union regarding changes to terms and conditions of employment. *See Geo V. Hamilton,* 289 NLRB 1335, 1339 (1988); *see also Nott*

[7] *See also, Donald Carroll Metals*, 185 NLRB 409, 410 (1970) (differences in pay of identically classified and supervised employees (as opposed to differences to mode or method of payment) have been held not to be factors which detract from community of interest which is otherwise present).

Co., 345 NLRB 396, 401 (2005)(an integration, without an accretion, results in no bargaining obligation even as to an existing group of employees).[8]

V. The 8(a)(1) Allegations

The Complaint in matter 18-CA-270402 alleges that supervisor, Matt Ides: (1) interrogated employees about union support in October of 2020; (2) during the same conversation threatened loss of a bonus program; and (3) threatened employees with loss of a bonus program in late November/early December 2020 if the Company was required to recognize the Union and (4) threatened the loss of a bonus program during a December 9, 2020 telephone call. (Complaint ¶ 5(a-d)).

A. Alleged Conversations Involving Sissum and Ides.

Employee, Sissum described two (2) alleged conversations with supervisor Ides. Sissum estimates the first conversation occurred around September 11, 2020. (Tr. 167). Sissum admits that Ides was having a discussion with another employee when Sissum interrupted and interjected himself. (Tr. 168). Put another way, Sissum provoked the conversation with Ides. (Tr. 168). In an apparent reference to Board litigation, Sissum asked Ides "what would happen [to the TFE Bonus Plan] if [the Company lost]." (Tr. 168). According to Sissum, Ides replied that he "***believed*** that it would go away." (Tr. 168).

Sissum described a second conversation on or around December 9, 2020. (Tr. 172). Sissum again introduced the topic of the TFE plan and asked whether, in the event the Board ruled in the Union's favor, "we would keep the TFE." (Tr. 172). According to Sissum, Ides said "he ***thought*** it would be no." (Tr. 173). Sissum further clarified Ides's alleged remarks as ***"[I]f we went back to negotiating***, the TFE plan would go away." (Tr. 175).

[8] Moreover, ADT had a right to implement any of the alleged changes unilaterally, as noted in Article 7 Management Rights Article of the collective-bargaining agreement.

Sissum's affidavit attributes a different comment to Ides. (Tr. 205-6). There, Sissum contends that Ides said "If the Union came back, both sides would be on the same pay scale." (Tr. 205). Sissum interpreted the remark to mean that both former Rockford and Madison employees would lose the TFE program. (Tr. 205). Sissum also admitted, however, that Ides's comment can be interpreted to mean "things would return to the status quo that existed prior to the Janesville consolidation." (Tr. 206).

In assessing whether an alleged statement is an unlawful threat, the Board considers all of the surrounding circumstances to determine if the statement could reasonably tend to have a coercive impact. *Federated Logistics and Operations*, 340 NLRB No. 36 (2003); *see also NLRB v. Gissel Packing Co.*, 395 US 575 (1969)(the Supreme Court has previously stated that an employer "may even make a prediction as to the precise effects he believes unionization will have on his company."); *UARCO, Inc.*, 286 NLRB 55 (1987); *Coach & Equip. Sales Corp.*, 228 NLRB 440, 441 (1977), *overruled on other grounds by Kokomo Tube*, 280 NLRB 357 (1986) . Here, on each occasion, Sissum admits he sought out Ides to question Ides about the TFE program. Ides allegedly opined that he "believed" or "thought" the program would go away, but stopped short of definitive knowledge of the subject and engaged in no behavior whatsoever indicating a threatening posture.

In fact, Sissum admits that Ides made explicit reference to "***negotiating***" with the Union depending on the Board's actions. (Tr. 175). Sissum further admits Ides comments likely meant a return to the "status quo that existed prior to the Janesville consolidation." (Tr. 206). This amounts to nothing more than a layman's understanding of traditional Board remedies.

Given these facts and based on Sissum's own admissions, Ides's alleged commentary simply cannot sustain an 8(a)(1) allegation. *St. Rita's Med. Ctr.*, 261 NLRB 357, 361

(1982)(isolated, *de minimus* reference to union in response to employee's statement about the union is not interrogation or otherwise violative of the Act); *Frito Lay, Inc.*, 341 NLRB 515, 517 (2004)(remarks about union or union activity not coercive when isolated and subject is immediately dropped).

B. Alleged Conversations Involving Anderson and Ides.

Employee David Anderson described a "five minute" conversation with Ides in October of 2020. (Tr. 275). Anderson admits the purpose of the call was for Ides to inform him of his performance rating and bonus payout which happened to be the highest in the Janesville facility. (Tr. 276). Ides told Anderson he had done "really well." (Tr. 276).

To hear Anderson tell it, Ides transitioned (in the course of this brief call) from his initial congratulatory tone into a discussion about the Union. (Tr. 277, 297). The Company, of course, had withdrawn recognition from the Union multiple weeks before Anderson's alleged conversation with Ides. (Tr. 297). Nonetheless, Anderson baldly claims Ides told him that the TFE bonuses program would "go away" and asked him "why he wanted to be in the Union." (Tr. 278).

Anderson also describes a second alleged conversation, which, according to Anderson, took place in the presence of employee Sissum. (Tr. 279). Sissum, however, provided no testimony to corroborate Anderson's tale. Regardless, Anderson claims he approached Ides to inform him of a Board subpoena and the need to be excused from work. (Tr. 280). Anderson claims that Ides, for no apparent reason, again referenced the TFE bonus program and stated ADT "would not do both." (Tr. 281).

Anderson, of course, is a wholly incredible witness who, by his own admission, embarked on a witch hunt to "root out" the source of the decertification petition. Regardless, even given the benefit of the doubt, Anderson's tale falls short of an 8(a)(1) violation given the brevity and

innocuous nature of his exchanges with Ides. *Frito Lay, Inc.*, 341 NLRB at 517 (2004)(remarks about union or union activity not coercive when isolated and subject is immediately dropped).

VI. Conclusion

For the foregoing reasons, ADT asks the Administrative Law Judge to dismiss the Complaints in their entirety. There is simply no reasoned basis for the conclusion that the former Rockford bargaining unit can exist independently given its absorption into Janesville and the undisputed, overwhelming community of interest shared by all Janesville employees. The General Counsel's theories to the contrary, to the extent he succeeds in even articulating them, lack merit.

Dated: March 12, 2020

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

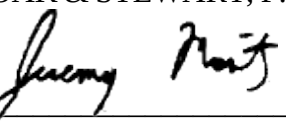
By: 

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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JENNIFER A. HADSALL, Regional Director of Region 18 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner v. ADT, LLC, Respondent	Civil No. 3:21-cv-9

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF ITS PETITION FOR PRELIMINARY INJUNCTION UNDER SECTION 10(j) OF THE ACT

The Petitioner, Jennifer A. Hadsall, Regional Director of Region 18 of the National Labor Relations Board (NLRB or Board), for and on behalf of the NLRB, seeks injunctive relief against ADT, LLC (Respondent) under Section 10(j) of the National Labor Relations Act (Act).[1] Petitioner seeks this relief to prevent irreparable harm to the collective-bargaining rights of employees and to protect the effectiveness of the Board's final remedy in the underlying administrative case. Protecting collective-bargaining rights is integral to protecting the public interest behind the Act. As recognized by the Seventh Circuit in *Bloedorn v. Francisco Foods, Inc.,*[2] "[t]he deprivation to employees from the delay in bargaining and the diminution of union support is immeasurable" and leads to "irreparable harm to the collective bargaining process." Respondent's conduct threatens these rights and, in turn, the public interest.

[1] 29 U.S.C.§ 160(j).

[2] *Bloedorn v. Francisco Foods, Inc.,* 276 F.3d 270, 299 (7th Cir. 2001).

Specifically, in September 2020, Respondent unlawfully withdrew recognition from the International Brotherhood of Teamsters, Local Union No. 364, AFL-CIO (Union), which had represented a bargaining unit of employees of the Respondent for over 26 years, and thereafter made unlawful unilateral changes to terms and conditions of employment without giving the Union the opportunity to bargain with Respondent with respect to this conduct. By this conduct, Respondent has failed and refused (and continues to fail and refuse) to bargain collectively and in good faith with the Union within the meaning of Section 8(d) of the Act.[3]

This conduct falls squarely within the confines of Section 10(j) of the Act, which is designed to prevent remedial failure during the pendency of the Board's often lengthy administrative proceedings. Without such relief, Respondent will successfully cripple the public's interest in effective collective-bargaining rights of employees to freely choose their bargaining representative.

I. THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings.[4] Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual.[5] Thus,

[3] 29 U.S.C. § 158(d).

[4] *See Harrell v. American Red Cross*, 714 F.3d 553, 556 (7th Cir. 2013); *Lineback v. Spurlino Materials, LLC,* 546 F.3d 491, 499 (7th Cir. 2008); *Bloedorn*, 276 F.3d at 286.

[5] *See* S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted in I *Legislative History of the Labor Management Relations Act of 1947* at pp. 414, 433 (Government Printing Office 1985).

Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation.[6]

Section 10(j) directs district courts to grant relief that is "just and proper." The Seventh Circuit holds that in determining what relief is "just and proper," district courts should apply the general equitable standards for considering requests for preliminary injunctions.[7] The Petitioner is entitled to interim relief when: (1) the Petitioner has no adequate remedy at law; (2) the labor effort would face irreparable harm without interim relief, and the prospect of that harm outweighs any harm posed to the employer by the proposed injunction; (3) "public harm" would occur in the absence of interim relief; and (4) the Petitioner has a reasonable likelihood of prevailing on the merits of the complaint.[8]

The Petitioner bears the burden of establishing the first, third, and fourth prongs by a preponderance of the evidence.[9] "The second prong is evaluated on a sliding scale: the better the Director's case on the merits, the less its burden to prove that the harm in delay would be irreparable, and vice versa."[10]

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[6] *See Lineback v. Irving Ready-Mix Inc.*, 653 F.3d 566, 570 (7th Cir. 2011); *Spurlino Materials*, 546 F.3d at 500.

[7] *Spurlino Materials*, 546 F.3d at 499–500; *Bloedorn*, 276 F.3d at 286; *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1566 (7th Cir. 1996).

[8] *Harrell*, 714 F.3d at 556; *Spurlino Materials,* 546 F.3d at 500; *Bloedorn*, 276 F.3d at 286.

[9] *Spurlino Materials,* 546 F.3d at 500; *Bloedorn*, 276 F.3d at 286.

[10] *Spurlino Materials*, 546 F.3d at 500 (internal citations omitted).

A. Likelihood of success

The Petitioner makes a threshold showing of likelihood of success by showing that its chances are "better than negligible."[11] Thus, in a 10(j) proceeding, the district court should determine whether "the Director has 'some chance' of succeeding on the merits."[12] In assessing whether the Petitioner has met this burden, a district court must take into account that Section 10(j) confers no jurisdiction to pass on the ultimate merits of the unfair labor practice case.[13] The Court's inquiry is confined only to "the *probability* that the Director will prevail."[14] Further, the Court must be "hospitable" to Petitioner's view of the law, given the Board's expertise in matters of labor relations.[15]

The District Court will be basing its decision based on the written record before the Administrative Law Judge. In these circumstances, the Court "owe[s] the Director a favorable construction of the evidence, much as we would if he were a plaintiff appealing the grant of summary judgment in favor of the defendant."[16] In doing so, the district court should not resolve credibility conflicts in the evidence.[17] The Court should credit the Director's version of the facts so long as they are "plausible" based on the record.[18]

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[11] *Spurlino Materials, LLC,* 546 F.3d at 502; *NLRB v. Electro-Voice, Inc.*, 83 F.3d at 1568.

[12] *Harrell,* 714 F.3d at 556; *Spurlino Materials,* 546 F.3d at 502.

[13] *Spurlino Materials*, 546 F.3d at 502; *Electro-Voice*, *Inc.,* 83 F.3d at 1567.

[14] *Bloedorn,* 276 F.3d at 287 (emphasis in original; *citing Electro-Voice*, *Inc.,*83 F.3d at 1570).

[15] *Bloedorn*, 276 F.3d at 287 (7th Cir.2001); *Spurlino Materials,* 546 F.3d at 502.

[16] *Bloedorn,* 276 F.3d at 287.

[17] *Electro-Voice*, *Inc.,* 83 F.3d at 1570–71.

[18] *Bloedorn, Inc.,* 276 F.3d at 287., citing *Electro–Voice, Inc.,* 83 F.3d at 1570.

B. No adequate remedy at law and the balance of the equities and public interest

The inquiry into an adequate remedy at law, the balance of harms, and the public interest overlap. In the Seventh Circuit, "the adequate remedy at law inquiry is whether, in the absence of immediate relief, the harm flowing from the alleged violation cannot be prevented or fully rectified by the final Board order."[19] Irreparable harm to collective bargaining leads to Board remedial failure and harms the public interest in protecting collective bargaining and deterring future violations.[20] "[T]he interest at stake in a section 10(j) proceeding is 'the public interest in the integrity of the collective bargaining process.'"[21]

II. PETITIONER DEMONSTRATED A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS AT THE UNDERLYING ADMINISTRATIVE HEARING

A. Case overview

This case arises from Respondent's unlawful withdrawal of recognition from the Union, which took place after Respondent closed its unionized Rockford, Illinois, facility and its non-unionized Madison, Wisconsin, facility, and relocated both groups of employees to a new facility in Janesville, Wisconsin. Approximately one year after the relocation, upon expiration of the collective-bargaining agreement covering the former Rockford unit employees, Respondent withdrew recognition from the Union and implemented unilateral changes to the unit employees' terms and conditions of employment. Respondent's actions violated Section 8(a)(5) and (1) of the Act.

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[19] *Harrell,* 714 F.3d at 557. (internal citations and quotations omitted).

[20] *See Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 744 (7th Cir. 1976) (the irreparable harm to be avoided in a Section 10(j) case is the threatened frustration of the remedial purpose of the Act and of the public interest in deterring continued violations).

[21] *Bloedorn,* 276 F.3d at 300 (internal citations omitted); *see also Harrell*, 714 F.3d at 557.

This is not the first time that Respondent has engaged in this type of conduct and, in fact, the controlling case in this area is *ADT Security Services*, 355 NLRB 1388 (2010), enforced 689 F.3d 628 (6th Cir. 2012) (referred to herein as *ADT I*), where Respondent engaged in almost identical conduct to the case at bar, and the Board concluded that its withdrawal of recognition was unlawful. The Board made clear that where, as here, a unit continues to maintain its integrity and separate identity, and there is a significant history of collective bargaining, the burden is on the respondent employer to demonstrate compelling circumstances to overcome the significance of the bargaining history.[22]

The structure of this section will begin with a recitation of the relevant facts, including: the parties' lengthy and significant bargaining history; detailed facts showing that the former Rockford employees' terms and conditions of employment remained almost entirely the same following the relocation to the Janesville facility and that Respondent continued to treat the former Rockford employees as a separate and distinct group from the former Madison employees; Respondent's withdrawal of recognition of the Union; and the subsequent unilaterally implemented changes to the unit employees' terms and conditions of employment. The fact section will be followed by a legal analysis applying the controlling *ADT I* case to the facts of this case. This analysis will show that, as in *ADT I*, there existed a lengthy collective-bargaining relationship between Respondent and the Union, the former Rockford Unit employees maintained their separate identity after the relocation, and that Respondent completely failed to meet its burden of demonstrating compelling circumstances to overcome the significant bargaining history. This will be followed by an analysis of the unlawful unilateral changes

[22] *ADT I*, 355 NLRB 1388 (2010), *enforced*, *N.L.R.B. v. ADT Sec. Servs., Inc.,* 689 F.3d 628 (6th Cir. 2012).

implemented by Respondent after its withdrawal of recognition. Last, the legal analysis section will briefly address Respondent's anticipated defenses.

B. Facts

i. Background, bargaining history, and the move from Rockford to Janesville

Respondent is a global company that installs and services residential and commercial security systems throughout the United States.[23] [24] This case concerns a bargaining unit originally located out of Respondent's former facility in Rockford, Illinois.[25] The Union was certified as the collective-bargaining representative for the installers and technicians[26] out of the Rockford, Illinois facility (herein, the "former Rockford Unit," "former Rockford technicians," or "former Rockford employees") on October 21, 1994, and the parties have been party to at least eight collective-bargaining agreements since then.[27] The most recent collective-bargaining agreement covering those workers was effective from September 1, 2017, to August 31, 2020.[28]

In about August of 2019, Respondent closed both its Rockford facility and an unrepresented facility in Madison, Wisconsin, and opened a new facility about halfway between the two in Janesville, Wisconsin.[29] The former Rockford employees began working out of a

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[23] Tr. 42.

[24] "Tr." references are to the transcript of the unfair labor practice hearing; "GCX" references are to exhibits entered at the hearing by the Petitioner; "RX" references are to exhibits entered by Respondent; "p" references an exhibit's page number.

[25] Tr. 43, 52; GCX 1(r).

[26] References to "technicians" will include both service technicians and service installers.

[27] Tr. 43; GCX 2, 3-10.

[28] Tr. 45, 58; GCX 3.

[29] GCX 1(u), GCX 11.

temporary facility in Janesville, Wisconsin, prior to moving to the permanent one.[30] The Madison employees did not join the group at the temporary facility, but only later, during fall/early winter 2019, did both groups begin working out of the permanent facility in Janesville.[31] It is undisputed, that at the time the two groups began working out of the permanent Janesville facility, the former Rockford employees outnumbered the Madison employees.[32] [33]

Prior to the move, Matt Ides, Respondent's Team Manager High Volume Install who managed the Rockford facility, assured the Rockford employees that everything would remain the same, "[t]hat we were going to stay in the Union, that everything would stay exactly the same as it is, nothing would change and [Rockford and Madison employees] would still stay separated."[34] Indeed, when asked what would change by the Union's Assistant Business Manager Larry Rowlett, Respondent's General Manager Shawn Bell replied, "Everything will stay the same. I mean, [the former Rockford Unit] would be working under that Collective Bargaining Agreement and everything would be the same other than when they went to an office location, it would be a different location. It would no longer be in Rockford."[35] In fact, it is uncontested that the collective-bargaining agreement continued to be applied only to the former Rockford employees after the move to Janesville and that Respondent continued to apply the same terms and conditions of employment exclusively to the former Rockford employees until it unlawfully withdrew recognition from the Union almost a year later.[36]

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[30] Tr. 51-52, 77, 99.

[31] Tr. 99, 102, 184, 221, 224, 225.

[32] Tr. 103, 104, 444-445.

[33] Tr. 103, 104, 444-445.

[34] Tr. 56-57, 255-56.

[35] Tr. 57.

[36] Tr. 57, 136-141, 231, 238, 260, 263-65.

ii. Former Rockford Unit employees' terms and conditions pre-move

Before the move, the former Rockford Unit would be dispatched from their homes directly to jobs scheduled by Respondent and were most often sent around the greater Rockford area to service and install residential security systems along with some light commercial assignments.[37] Though there were no defined boundaries serviced by the Rockford facility, the former Rockford employees spent most of their time in Illinois and were seldom assigned to locations in Wisconsin other than to Beloit, located on its southern border and only about 16 miles from the former Rockford facility.[38] On those rare occasions that they did travel further into Wisconsin, they would go up to Madison and even further north.[39]

The former Rockford employees' schedules were assigned and communicated to the Rockford Unit by computer, which set forth their schedule for the day.[40] The former Rockford employees would visit the Rockford facility for a regularly scheduled weekly parts pickup and to exchange and recycle equipment on Fridays and on an as-needed basis.[41] The former Rockford employees' direct supervisor, Matt Ides, managed both of the Rockford and Madison facilities and shared his time between the two locations.[42] The former Rockford employees communicated with Mr. Ides multiple times daily, either by text message or by phone for purposes of scheduling or parts issues.[43] They worked alone for most of their time and only worked with another

[37] Tr. 118, 120, 219, 232, 240.

[38] Tr. 118, 120-121, 241-242, 301, 307, 317.

[39] Tr. 121, 242.

[40] Tr. 240.

[41] Tr. 112, 114-115, 233, 244.

[42] Tr. 116, 220.

[43] Tr. 115, 116, 236-239.

technician when assigned or due to the nature of the job.[44] When assigned to work with another technician, the former Rockford employees worked almost exclusively with other former Rockford technicians and only on occasion worked with a technician from Madison.[45] The former Rockford technicians all had a certification to work in Illinois; there were no certification requirements to work in Wisconsin.[46]

While working out of the Rockford facility, all the terms of the collective-bargaining agreement were applied to the Rockford Unit employees, including wages, overtime, vacation, and grievance procedure, among others.[47] The agreement's terms were not applied to the Madison technicians.[48] Pursuant to the collective-bargaining agreement, Respondent remitted dues to the Union for each former Rockford Unit employee.[49] Respondent maintained an emergency after hours on-call list, which contained two names per week: one former Rockford technician and one Madison technician, each covering their respective territories due to the emergency nature of the calls.[50]

Prior to the move, the former Rockford technicians interacted with the Madison technicians infrequently when they worked together or exchanged parts in the field and when they picked up parts at the Madison facility.[51]

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[44] Tr. 233-234.

[45] Tr. 235.

[46] Tr. 244, 245.

[47] Tr. 57, 110, 229, 230; GCX 3.

[48] Tr. 58.

[49] GCX 3.

[50] Tr. 129, 247-249.

[51] Tr. 113, 225, 234-235.

iii. Former Rockford Unit employees' terms and conditions post-move

After the move to Janesville[52] the Rockford unit employees' terms and conditions of employment did not materially change. They continued to be dispatched from their homes.[53] Their job descriptions and pay remained the same.[54]The licensing requirements for working in Illinois remained the same.[55] The former Rockford Unit continued to be assigned daily schedules in the same way.[56] The type and percentage of work that was residential versus commercial remained the same.[57] Apart from going to the Janesville facility weekly for parts pick up, the former Rockford technicians' geographic service area continued to be the same as before, with the general Rockford area being the predominant area that they serviced.[58]

The former Rockford technicians also continued to report directly to the same supervisor, Matt Ides, with only a slight decrease in face-to-face contact, due to Ides now working out of the Janesville facility and the former Rockford technicians continuing to work primarily out of the Rockford area. As one former Rockford technician explained, "it wasn't easy for [supervisor Ides] to just jump in the car and bring me a part."[59]

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[52] The Rockford unit employees first moved to a temporary facility located in Janesville, Wisconsin, prior to moving to the permanent facility. (Tr. 221). For purposes of this Memorandum, Petitioner collectively refers to the temporary and permanent Janesville locations as the Janesville location, unless otherwise stated.

[53] Tr. 136.

[54] Tr. 136, 256, 258.

[55] Tr. 136, 258-259.

[56] Tr. 136, 256.

[57] Tr. 137, 259.

[58] Tr. 137, 259-260.

[59] Tr. 137-138, 260.

Just as before the move to Janesville, the former Rockford technicians continued to be scheduled to pick up parts at the new Janesville facility on Fridays.[60] [61] They continued to earn the same overtime rate as set forth in the collective-bargaining agreement.[62] The same on-call system remained in place and the on-call list continued to list two names for each week: one former Rockford technician and one Madison technician, each servicing their respective areas.[63] The former Rockford technicians also continued to earn the same on-call rate as set forth in the collective-bargaining agreement.[64]

Interactions with Madison technicians in the field also largely remained the same.[65] However, the former Rockford technicians testified they may randomly see a Madison technician a little more frequently if they happen to be in the Janesville facility to pick up a part at the same time.[66] After moving to Janesville, the former Rockford technicians and Madison technicians had about two in-person training sessions at the new facility; the first session took place during the end of 2019 and the second session occurred in January 2020.[67]

iv. The Union filed and withdrew a representation petition

On May 8, 2020, the Union filed a representation petition to create a new bargaining unit in Janesville consisting of both the former Rockford Unit and the other technicians now working

[60] Madison technicians were scheduled to pick up parts on Tuesdays. (Tr. 139).

[61] Tr. 138.

[62] Tr. 139.

[63] Tr. 139, 147-148, 263-264; GCX 30 (Note, GCX 30 was inadvertently marked with a GCX 29 stamp in the administrative hearing record.)

[64] Tr. 264.

[65] Tr. 140-141, 265, 306-307.

[66] Tr. 140-141, 265, 306-307.

[67] Tr. 143-145.

out of the Janesville facility. The representation petition was withdrawn by the Union one week later and no election was held.[68]

v. Respondent announced it would withdraw recognition from the Union

During the spring of 2020, Respondent received a decertification petition signed solely by former Madison and other newly hired employees seeking to decertify the Union that had never represented them.[69] Purportedly based on this petition, Respondent notified the Union of its intention to withdraw recognition upon the expiration of the current collective-bargaining agreement by letter on June 22, 2020.[70]

On July 6, 2020, the Union responded to Respondent's notice, by letter, disputing Respondent's assertion that a majority of employees from the former Rockford bargaining unit sought to decertify the Union. The letter stated, in part, "To our knowledge, ADT has never applied the terms of the Local 364 agreement to any other employees who may be working in the Janesville location. The Rockford bargaining unit members who were transferred to Janesville continue to want [the Union] to represent them, and none have signed any such petition, as claimed by ADT. To the extent such a petition was signed by employees outside of the Rockford bargaining unit, [the Union] has never asserted that they are bound by or covered by [sic] Rockford collective bargaining agreement."[71] The administrative record clearly demonstrates that not a single former Rockford Unit employee signed the petition.[72] Indeed, Respondent's

[68] Tr. 305, 395; GCX 12, 13.

[69] Tr. 150, 432, 443-444; GCX 14.

[70] Tr. 58-59, 430-432; GCX 15.

[71] Tr. 62; GCX 16.

[72] Tr. 153; GCX 14.

own Director of Labor Relations James Nixdorf testified that Respondent never considered the non-former Rockford employees to be part of the bargaining unit.[73] Respondent never replied to the Union's July 6, 2020, letter in response to Respondent's notice to withdraw recognition., nor did it reply to any of the seven subsequent requests to bargain made by the Union.[74] Respondent carried out its stated intentions and ultimately withdrew recognition from the Union on August 31, 2020.[75]

vi. Post-withdrawal unilateral changes

Following Respondent's unlawful withdrawal of recognition, it made unilateral changes to the former Rockford Unit's terms and conditions of employment, including changing the method of compensation, overtime and paid time off, implementing a bonus system that had been previously offered only to the non-represented employees and instituting a new performance review system.[76] [77]

a. Method of compensation. Prior to the withdrawal of recognition, the former Rockford Unit employees were paid according to the longevity-based wage scale set forth in the collective-bargaining agreement's Schedule "A."[78] After withdrawal, and during about

[73] Tr. 58, 444.

[74] Tr. 64-66; GCX 17-23.

[75] Tr. 58.

[76] Tr. 160-167, 176-179, 271; GCX 1(u).

[77] Respondent denied making any unilateral changes in its first Answer to Petitioner's underlying administrative Complaint yet admitted making them in this District Court proceeding. (GCX 1(i), GCX 31). During the administrative hearing, after being confronted with its response to this District Court proceeding, Respondent amended its answer to partially admit having made the alleged unilateral changes. (GCX 1(u)).

[78] GCX 3, p 22.

September 2020, Respondent increased wages for the former Rockford unit employees between $.12 and $.71 per hour, averaging about $.57 per hour increase among the five former Rockford Unit technicians.[79] Respondent also made increases dependent on employees meeting certain criteria and training.[80]

b. Overtime. Prior to the withdrawal of recognition, Article 14 of the collective-bargaining agreement set forth the overtime structure, whereby former Rockford employees would earn the overtime rate after working 8 hours each day, regardless of how many hours were worked that week.[81] After the withdrawal of recognition, Respondent changed the overtime policy so that employees need to work 41 hours in a week to get one hour of overtime.[82] Holidays and other paid time off are also no longer included in the calculation for overtime.[83]

c. Paid time off. Prior to the withdrawal of recognition, the former Rockford Unit employees earned separate vacation time and sick time, which were set forth in Articles 12 and 19 of the collective-bargaining agreement, respectively.[84] Since the withdrawal of recognition, Respondent no longer offers the former Rockford employees separate vacation and sick time, but instead gives them one lump-sum category of paid time off.[85] Paid time off is now

[79] GCX 33, p 3-4; Former Rockford Unit employees: David Anderson, Gabriel Files, Jon Frazier, Scott Joswick, and Danny Sissum.

[80] Tr. 164-165, 269, 271.

[81] Tr. 165; GCX 3, p 11-12.

[82] Tr. 165-166, 269, 271.

[83] Tr. 165-166, 269, 271.

[84] Tr. 160; GCX 3.

[85] Tr. 167-168, 271.

dependent on the hours worked each week.[86] The former Rockford employees can also now sell their paid time off back to Respondent and roll over up to 40 hours of paid time into the next year.[87]

d. Bonus eligibility. Prior to the withdrawal of recognition, the former Rockford Unit employees were not eligible to earn bonuses.[88] Upon withdrawal of recognition, Respondent implemented a new performance-based bonus plan.[89] Under the new bonus structure, the former Rockford employees earn hundreds of dollars per month.[90]

e. Performance Review System. Since approximately mid-2020, the former Rockford employees were tasked with notifying customers about a survey program called Medallia.[91] Whereas prior to the withdrawal of recognition, the customer responses had no effect on compensation, after the withdrawal, the responses are factored into employees' performance reviews and, ultimately, their compensation.[92]

C. Respondent withdrew recognition from the Union in violation of Section 8(a)(5) of the Act

i. *ADT I* controls the instant case

As noted above, the legal rubric to be applied to the facts in the instant case are set forth in the Board's decision in *ADT I*.[93] That case involved Respondent's unlawful withdrawal of

[86] Tr. 167-168, 271.

[87] Tr. 160, 166-167, 269, 271.

[88] Tr. 160.

[89] Tr. 164-165, 273; GCX 34.

[90] Tr. 165, 271, 274-275.

[91] Tr. 176-177.

[92] Tr. 176-178, 282-283.

[93] *ADT I*, 355 NLRB 1388 (2010), *enforced*, *N.L.R.B. v. ADT Sec. Servs., Inc.,* 689 F.3d 628, 632 (6th Cir. 2012).

recognition from a different union that represented another unit of employees that had also been relocated to another facility.[94] The issue in *ADT I*, and in the instant case, is whether a represented unit with a long bargaining history, after being transferred to a new facility with other unrepresented workers, continued to maintain its integrity and separate identity. When, as in *ADT I* and also here, the unit maintains its integrity and there is a significant history of collective bargaining, the burden is on Respondent to demonstrate *compelling circumstances* to overcome the significance of this bargaining history.[95]

ii. The facts and legal findings in *ADT I*

In *ADT I*, the union represented employees at Respondent's Kalamazoo, Michigan facility for 29 years.[96] Respondent closed the Kalamazoo facility and transferred the 14 represented employees to its Wyoming, Michigan, location, out of which 27 non-represented service employees also worked. Respondent withdrew recognition from the Union as of the date of the consolidation.[97] After their transfer to the Wyoming facility, Respondent continued to pay the Kalamazoo employees their contractual wage rate, which was more than the rate paid to the Wyoming employees.[98] The Kalamazoo employees reported to Wyoming and no longer operated under separate supervision.[99] They continued to perform the same work (the installation and service of security systems) in the same distinct geographical area (the Kalamazoo service territory), under largely unchanged terms and conditions of employment, including separate on-

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at 1393.

[98] *Id.* at 1394.

[99] *Id.* at 1393.

call lists (to handle emergencies on nights and weekends) for commercial and residential service.[100] Both before and after the transfer to Wyoming, the Kalamazoo unit employees were dispatched from home and performed work in the field, reporting originally to the Kalamazoo facility only to turn in their timesheets and pick up supplies, and later, after closing, reporting to the Wyoming facility only once a week to replenish their parts supply.[101]

Finding that Respondent unlawfully withdrew recognition from the union, the Board noted that when evaluating whether an existing unit remains appropriate in light of changed circumstances, the Board gives *significant weight* to the parties' history of bargaining: "Specifically, our caselaw holds that '*compelling circumstances*' are required to overcome the significance of bargaining history."[102]

The Board found that the historical unit of Kalamazoo servicemen maintained its integrity following the closure of the Kalamazoo facility and remained an appropriate unit with which Respondent was obligated to bargain.[103] Respondent was not privileged to withdraw recognition from the Union as the collective-bargaining representative of the Kalamazoo unit

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[100] *Id.* at 1388, 1393 and 1394.

[101] *Id.* at 1388, 1393 and 1394.

[102] *Id.* at 1388 *(emphasis added)* (quoting *Radio Station KOMO-AM*, 324 NLRB 256 (1997)). *See also Dallas Air Motive, Inc.*, 370 NLRB No. 3 (2020) (noting it was the respondent's burden to show that the represented bargaining unit was no longer an appropriate unit for bargaining after being combined with a similar group of employees at a new facility because it did not have an identity distinct from the combined group of employees); *Children's Hosp. of San Francisco*, 312 NLRB 920 (1993)), *enforced*, 87 F.3d 304 (9th Cir. 1996) (finding that the administrative law judge's reliance on bargaining history in finding a unit of registered nurses to be appropriate was not erroneous).

[103] *Id.* at 1389, citing *Comar, Inc*., 339 NLRB 903, at 903 fn. 2*, See Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1272 fn. 10 (2005), *enforced mem.,* 181 Fed. App'x 85 (2d Cir. 2006).*enforced mem.,* 111 Fed. App'x 1 (D.C. Cir. 2004).

because the bargaining unit maintained its integrity and Respondent could not establish that the Kalamazoo unit employees were "absorbed" or "integrated" into a unit including all the servicemen who worked out of the Wyoming facility. Some of the most fundamental terms of employment that distinguished the Kalamazoo servicemen from the Wyoming servicemen included the: (1) location of their work; (2) their rate of pay; and (3) their separate, dual "on call list." The Board noted that these factors remained intact following the close of the Kalamazoo facility and continued to separate them from the Wyoming servicemen.[104] In addition, the Board noted that the closing of the Kalamazoo facility was of less significance than it would have been had the employees actually performed work at the facility; instead, after the closing, the Kalamazoo employees continued to perform work in the field and reported to the Wyoming facility only once a week to replenish their parts supply. Given the separate identity of the Kalamazoo bargaining unit, Respondent was unable to demonstrate compelling circumstances sufficient to overcome the parties' lengthy bargaining history.[105]

Notably, after the administrative hearing and prior to the Board's decision in *ADT I*, the Regional Director filed a petition with the district court seeking a temporary injunction that required Respondent to, inter alia, recognize the Union and rescind certain unilateral changes. The district court denied the petition and the Director appealed. The Sixth Circuit reversed and remanded, holding that the Director demonstrated reasonable cause to support injunctive relief.[106]

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[104] *Id.* at 1388

[105] *Id.*

[106] *Glasser ex rel. N.L.R.B. v. ADT Sec. Servs., Inc.*, 379 F. App'x 483, 487 – 489. (6th Cir. 2010).

iii. There is a lengthy bargaining history in the instant case

As in *ADT I*, Respondent and the Union have a lengthy collective-bargaining history. Here, the collective-bargaining relationship spanned over 26 years. The Union was certified as the representative of the bargaining unit in 1994, and the parties subsequently entered into at least eight collective-bargaining agreements, including the most recent agreement that expired on August 31, 2020.[107]

iv. The Rockford Unit maintained its integrity and separate identity

Like the Kalamazoo unit, the Rockford Unit maintained its integrity and separate identity after the relocation to Janesville and prior to the unlawful withdrawal of recognition on about September 1, 2020.[108] The Board in *ADT I* noted that the Kalamazoo unit employees "continued to perform the same work in the same distinct geographical area under largely unchanged terms and conditions of employment."[109] This continuity in work and terms and conditions of employment is also present in the instant case.

After the relocation to Janesville and prior to the unlawful withdrawal of recognition, the former Rockford employees continued to perform the same installation and service work in the de facto defined Rockford territory under largely unchanged terms and conditions of employment, including those set forth in the still-applied collective-bargaining agreement.[110]

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[107] GCX 2 – 10.

[108] The post-withdrawal unilateral changes to Unit employees' terms and conditions of employment are unfair labor practices and do not factor into an analysis of whether the Rockford unit maintained its integrity and separate identity prior to the unlawful withdrawal of recognition. *See Comar*, 339 NLRB at 911 (noting that unlawful changes do not establish that the unit lost its separate identity because "[t]o hold otherwise would allow [r]espondent to benefit from its own unlawful conduct").

[109] *ADT I*, 355 NLRB at 1388.

[110] Tr. 57, 136 – 141, 257 – 265.

Post-relocation and prior to the withdrawal of recognition, Respondent continued to apply the collective-bargaining agreement in its entirety to the former Rockford Unit.[111] Their contractual terms and conditions of employment, including but not limited to wages, overtime, and on-call rates remained the same.[112] The terms of the collective-bargaining agreement were not applied to the non-represented former Madison employees.[113] Accordingly, given the breadth of the contractual terms, their continued application to the former Rockford Unit is a key factor indicating these employees maintained their own separate identity.

In addition to being distinguished by the application of contractual wages and terms to the former Rockford Unit employees, the two groups were further distinguished by the location of their work. The former Rockford employees worked in the same geographic area both before and after the relocation to Janesville, primarily in Rockford and the surrounding area.[114] Former Rockford employee Danny Sissum continues to spend the majority of his working time in Rockford and the surrounding area. The remainder of the time, he may be sent to Iowa, or Beloit, Wisconsin, a town on the border of Illinois and Wisconsin. Sissum described the amount of time he works in Wisconsin as minimal, mostly in Beloit but sometimes in Madison or further north.[115] Former Rockford employee David Anderson also continues to spend most of his working time in Rockford and its surrounding area. He works in Beloit, but otherwise does not often work in Wisconsin.[116]

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[111] Tr. 57 – 58, 110, 230 – 231.

[112] Tr. 109 – 110, 140, 256, 263.

[113] Tr. 58.

[114] Tr. 137, 259.

[115] Tr. 120 – 121.

[116] Tr. 240 – 242.

The separation of the former Rockford employees and the former Madison employees by geographic area is evident in the on-call list, which existed in the same format both prior to and after the relocation to Janesville.[117] A former Rockford employee and a former Madison employee are assigned to be "on-call" and respond to emergency calls for each week of the year.[118] The former Rockford employees are able to switch their assignments with other former Rockford employees.[119] As Sissum explained, it would not be feasible to have the former Rockford employees switch on-call assignments with a Madison employee because the response time for a former Rockford employee to go deep into Wisconsin on an emergency call would be too great.[120]

Respondent may point to the interchange between the former Rockford employees and the former Madison employees while on the job and their shared supervisor as evidence of an integrated unit. However, interaction between the two groups of employees and shared supervision are not changed circumstances in this case and do not demonstrate any degree of integration.[121] Prior to the relocation to Janesville, the former Rockford employees and the former Madison employees attended trainings together and, albeit infrequently, encountered each other while out in the field for work.[122] Their interaction may have slightly increased due to their reporting to the same Janesville office but there is no evidence of any demonstrable change in

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[117] Tr. 263-264.

[118] Tr. 147 – 148, 247.

[119] Tr. 128 – 129.

[120] Tr. 129 – 130.

[121] *See Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1272 fn. 10 (2005), *enforced mem.,* 181 Fed. App'x 85 (2d Cir. 2006) (noting that a finding of employee interaction cannot substitute for a finding of employee interchange).

[122] Tr. 113, 130 – 131, 225, 235.

interaction between the two groups.[123] That there has only be a negligible increase in interaction is to be expected given that each group of employees performs their work in the field and is scheduled to come to the facility once weekly, on different days, to pick up parts.[124]

The former Rockford employees and the former Madison employees have historically shared the same supervisor and their continued common supervision serves as further evidence of the continuity of the former Rockford employees' working conditions. Even if the common supervision arose after the transfer to Janesville, it would not weigh in favor of a finding that the two groups constituted a single integrated unit. As the Board noted in *ADT I*, "because the servicemen at issue in this case work out of their homes, have no onsite supervision, and in fact, do not even see their supervisors on a daily basis, we do not accord the absence of separate supervision here the weight it bears in other cases."[125]

The Board's reasoning in *ADT I* concerning the lack of weight accorded to shared supervision also applies to the two groups of employees' post-relocation interaction with the same office staff at the Janesville facility. This is especially since Respondent has failed to demonstrate any significant interaction between the service employees and the office staff.[126] That a common lunch space is available to both groups of employees is also without consequence, especially as the former Rockford employees and the former Madison employees

[123] Tr. 140, 143 – 144, 261, 306 - 307.

[124] Tr. 83 – 84, 138 - 139, 219, 256, 259 - 260, 262.

[125] *ADT I*, 355 NLRB at 1389, fn. 2.

[126] Tr. 184 – 186, 302 – 304.

do not report to the Janesville office for their weekly parts pick-up on the same day of the week.[127] Furthermore, both Sissum and Anderson testified that they did not use this space.[128]

In sum, with the Respondent and Union's lengthy bargaining history, the continued application of collective-bargaining agreement to the former Rockford Unit after the relocation to Janesville, and the former Rockford employees' continued dispatch from home to work in the field performing the same job functions in the same geographic area with no significant increase in interaction with the former Madison employees, the former Rockford Unit maintained its separate identity and integrity.

v. Respondent failed to meet its burden to establish compelling circumstances

Despite given a full opportunity at the hearing to present witnesses and documentary evidence to demonstrate that compelling circumstances existed to overcome the parties' significant bargaining history, Respondent failed to meet its burden. Respondent argues that the former Rockford employees and former Madison employees shared an overwhelming community of interest because they share the same or similar wage rates and perform the same work out of the same facility under the same supervision and according to the same work pools.[129] There is no dispute that the two groups of employees share the same supervision (as they always have) and perform the same type of work out of the Janesville facility.[130] However, Respondent failed to call any witnesses with direct knowledge of the employees' terms and conditions of employment, including their wage rates or work areas. Despite it being

[127] Tr. 138 - 139, 260, 262.

[128] Tr. 193, 308.

[129] Tr. 389 – 290.

[130] Common work duties are also not changed circumstances in the instant case. The two groups of employees have historically performed the same type of work. (Tr. 81, 209, 424 - 425.)

Respondent's burden to demonstrate compelling circumstances, Respondent failed to call a single employee to testify regarding the geographic area in which they work. As such, Respondent is unable to prove that the two groups of employees constituted a single integrated unit at any point in time.

Respondent called only two witnesses: Union organizer, Brad Williams, and Director of Labor Relations, James Nixdorf. Williams offered no testimony regarding the employees' terms and conditions of employment.[131] Nixdorf, based out of Boca Raton, Florida,[132] who is responsible for administering collective-bargaining agreements for approximately 30 bargaining units across the United States, gave only general testimony regarding employee work areas and later admitted to having no independent knowledge of where each technician in the instant case spent their work time (one of the fundamental factors at issue in this case as set forth in *ADT I*).[133] He offered only vague testimony regarding the former Madison employees' wages, one of the most significant terms and conditions of employment.[134]

Significantly, Respondent failed to call the former Rockford employees' and former Madison employees' direct supervisor, Team Manager High Volume Install Matt Ides.[135] Ides supervises the former Rockford employees and former Madison employees, as he did prior to the relocation to Janesville. Ides sees the employees weekly at their parts pick-up and communicates with at least the former Rockford employees daily.[136] He is arguably in the best position to

[131] Tr. 390 – 402.

[132] GCX 15 (letterhead showing Boca Raton, Florida address).

[133] Tr. 346, 423 and 441.

[134] Tr. 426.

[135] Tr. 98, 219 - 220.

[136] Tr. 98, 114 - 116, 137, 220, 236 - 238, 259 – 260.

testify regarding the terms and conditions of employment of these two groups, yet Respondent inexplicably failed to call him to the stand.

Any attempts by Respondent to rely on its cross-examination of the former Rockford employee witnesses to establish that there was a change in the geographic area in which they worked post-relocation to Janesville must fail. Former Rockford employee Sissum credibly testified on direct examination that while working at the Rockford facility, he spent the majority of his working time in Rockford and its surrounding areas, and a minimal amount of time working in Wisconsin, and that these working areas did not change after the relocation to Janesville.[137] On cross-examination, he consistently testified that while working out of the Rockford facility, he spent only a small percentage of his typical work week in Wisconsin.[138] His testimony that he now goes to Wisconsin every week hardly establishes a changed geographic work area, as it is undisputed that the former Rockford employees now report to the Janesville, Wisconsin facility every Friday for their scheduled parts pick-up.[139] Former Rockford employee Anderson's testimony on cross-examination that he was unaware of any geographic distinction between where the former Rockford employees and the former Madison employees worked is undercut by his more detailed testimony on direct examination that he works mainly in Illinois, in Rockford or within 20 miles thereof, and that other than the border of Illinois and Wisconsin, he does not work in Wisconsin often and only on an as-needed basis.[140]

Respondent failed to compensate for its lack of relevant testimony through the presentation of compelling documentary evidence. For instance, the weight of Respondent's case

[137] Tr. 120, 137.

[138] Tr. 209.

[139] Tr. 138, 209.

[140] Tr. 240 - 242, 308.

at the administrative hearing appeared to be that the former Rockford employees' geographic coverage changed after the relocation to Janesville. Director of Labor Relations Nixdorf, who admitted to having no independent knowledge of where each technician worked, offered only general testimony regarding the former Rockford employees' coverage area.[141] Although Respondent possessed dispatch logs that showed each customer's address and could have easily resolved the question of what geographic area the service employees worked in, Respondent failed to introduce these records into evidence.[142] Respondent identified a document that included information from its Oracle HR system that reflects wage rates for both former Rockford employees and former Madison employees working at the Janesville facility.[143] However, Respondent offered no context for this document, including how the former Madison employees' wages were determined, i.e. by seniority, performance or any other criteria, or how the former Madison employees' job titles, skills, training and experience compared to that of the former Rockford employees. Regardless, any similarity between wages does not detract from the fact that the wage rates for the former Madison employees were determined by Respondent whereas the wage rates received by the former Rockford Unit employees, both prior to and after the relocation to Janesville, were collectively-bargained and contractually derived.

As the record testimony does not establish that the former Rockford employees were absorbed or integrated into a unit including all the employees who work out of the Janesville

[141] Tr. 422 - 423, 441.

[142] Tr. 364, 376, 381.

[143] Tr. 425; GCX 33.

facility, Respondent cannot establish compelling circumstances to overcome the parties' lengthy 26-year collective-bargaining relationship.[144]

vi. Respondent cannot distinguish the instant case from *ADT I*

The facts in *ADT I* closely parallel the facts in the instant case.[145] In both cases, Respondent withdrew recognition from the union after a lengthy bargaining relationship and where the unit employees maintained separate and distinct identity from the non-unionized group of employees. Respondent attempts to distinguish the facts in the instant case from those in *ADT I* by arguing that the collective-bargaining agreement in *ADT I* contained a work jurisdiction clause, which defined the unit as serving the Kalamazoo territory, and a notification clause, which required that the Union be notified of anyone else working in that territory.[146]

It is undisputed that the collective-bargaining agreement in the instant case does not contain a work jurisdiction clause or a notification clause.[147] However, the absence of these clauses does not take the instant case out of the legal rubric set forth in *ADT I.*[148] The Board's analysis focused on the fact that the Kalamazoo unit employees "continued to perform the same work in the same distinct geographical area under largely unchanged terms and conditions of employment."[149] That the distinct geographic work area for the former Rockford unit employees

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[144] See *Children's Hosp. of San Francisco*, 312 NLRB at 929 (adopting the administrative law judge's decision and order in which he noted that respondent had not demonstrated "compelling" reason to overcome the significance of bargaining history by, inter alia, failing to support its assertions about employee interchange with records or specific evidence).

[145] *ADT I*, 355 NLRB at 1388.

[146] Tr. 389 – 390, 424

[147] GCX 3.

[148] *ADT I*, 355 NLRB at 1388.

[149] *Id.*

is defined de facto, and not contractually, and that the Union was not notified of others working in the Rockford territory, are not material differences. The Board's legal analysis in *ADT I* is appropriately applied in the instant case.[150]

D. Respondent unlawfully implemented unilateral changes to the former Rockford employees' terms and conditions of employment post-withdrawal of recognition in violation of Section 8(a)(5) of the Act

It is well-established that an employer's implementation of unilateral changes after an improper withdrawal of recognition are unlawful.[151] As the evidence establishes that Respondent unlawfully withdrew recognition from the Union, it follows that the unilateral changes to the former Rockford employees' terms and conditions of employment, to which Respondent essentially admits, are also unlawful.

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[150] Respondent may argue that *ADT Security Services*, 368 NLRB No. 118 (referred to herein as *ADT II*) is applicable to the instant case. However, *ADT II* is both factually and legally distinguishable from the instant case. *ADT II* involved Respondent's consolidation with a competitor in the same greater metropolitan area that resulted in significant integration between the groups of employees. This is factually distinguishable from the instant case, in which two groups of employees who continue to work in two geographically distinct and distant service areas now report to one centralized office. *ADT II* is also legally distinguishable as the Board found that the administrative law judge had erroneously approached an accretion issue that is not present in the instant case.

[151] *In Re Scepter Ingot Castings, Inc*., 331 NLRB 1509 (2000), *enforced* 280 F.3d 1053 (D.C. Cir. 2002) (finding the employer's unilateral changes implemented after unlawful withdrawal of recognition violated Section 8(a)(5)); *Texas Petrochemicals Corp.,* 296 NLRB 1057, 1063 (1989), enforced in relevant part and remanded 923 F.2d 398 (5th Cir. 1991), rehearing denied 931 F.2d 892 (5th Cir. 1991) (finding that after unlawfully withdrawing recognition from the union, the respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, without notice to or consultation with the union, converting all bargaining unit employees from hourly to salaried compensation and restructuring their insurance premiums); *Peat Mfg. Co.,* 251 NLRB 1117, 1117 (1980), *enforced*. 673 F.2d 1339 (9th Cir. 1982) (finding that the respondent violated Section 8(a)(5) and (1) of the Act by unilaterally granting benefits to unit employees after unlawfully withdrawing recognition from the union).

Petitioner's Petition for Injunctive Relief[152] Under Section 10(j) of the National Labor Relations Act, As Amended, alleges that in September 2020 [after the unlawful withdrawal of recognition], Respondent made the following unilateral changes:[153]

(1) changed the wages for the Unit;

(2) changed how overtime is earned for the Unit;

(3) changed the manner of in which the Unit accrues and uses paid time off;

(4) made the Unit eligible for its bonus system offered to unrepresented employees; and

(5) made other changes to the Unit employees' terms and conditions of employment that are currently unknown to the Board's General Counsel.

Respondent's Answer and Defenses to Petition for Injunction Under Section 10(j) admits the changes made to wages, overtime, paid time off, and that the Unit was offered a bonus system in September 2020. Respondent denies making other changes to the Unit employees' terms and conditions of employment.[154]

Based on testimony during the administrative hearing, the consolidated complaint in the administrative proceeding was amended to include additional allegations of unilateral changes, specifically adding that Respondent changed the wages *and method of compensation* for the Unit and *implemented a new performance review system*.[155] Respondent filed an amended answer in the administrative proceeding that acknowledged these changes, but denied that they violated the

[152] Petition in Civil Case No. 3-21-cv-9.

[153] Details as to how Respondent changed terms and conditions of employment in these areas are described above in the statement of facts, section II.B.vi.a-e

[154] GCX 1(i).

[155] GCX 1(t). (Please note that GCX 1(t) and 1(u) appear before GCX 1(a)).

Act.[156] [157] Petitioner requests that any order granting injunction issued by this Court encompass these additional unilateral changes.

E. Respondent's defenses must fail

Respondent's defense to the allegation that it unlawfully withdrew recognition from the Union rests largely on a May 8, 2020, representation petition that the Union filed with the Board. The petition sought to represent a unit consisting of all service employees working out of the Janesville facility and was promptly withdrawn. Respondent appears to argue that the filing of this petition demonstrated the Union's belief that there existed an integrated unit of former Rockford employees and former Madison employees. By asserting the existence of such an expanded unit, Respondent then relies on a decertification petition signed by only the non-unionized former Madison employees to show that a majority of the former Rockford Unit no longer wished to be represented by the Union and Respondent properly withdrew recognition from the Union.[158] This defense must fail.

i. The withdrawn representation petition has no bearing on the appropriateness of the already established Rockford Unit

The May 8, 2020, representation petition filed by the Union sought to represent a unit consisting of all service employees working out of the Janesville facility.[159] On May 15, 2020, the Region issued an order approving the Union's request to withdraw the petition.[160] As the

[156] GCX 1(u).

[157] Specific details of these changes are described in the statement of facts section, II.B.vi.a-e

[158] Tr. 67 – 69, 152 – 153; GCX 14, 24 – 25.

[159] GCX 12.

[160] GCX 13.

parties did not reach a stipulated election agreement and no election was held, no determination was made by the Board on the appropriateness of the petitioned-for unit.[161]

The Union's brief, and since abandoned, pursuit of a unit that included both the former Rockford employees and the former Madison employees is a red herring and has no bearing on the appropriateness of the already well-established Rockford unit. Section 9(b) of the Act grants the Board authority to determine "the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b). It is well-established that the Board need only find *an* appropriate unit, not the *most* appropriate unit, and more than one appropriate unit may exist among the same group of employees.[162] As the Board noted in *ADT I:*

> Even absent the 29 year-old bargaining relationship, were the Union now to petition to represent the service employees assigned to southwestern Michigan, the question would not be whether the unit sought was the most appropriate unit, i.e., whether the unit of all servicemen operating out of the Wyoming facility is more appropriate, but merely whether it was an appropriate unit.[163]

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[161] Tr. 20.

[162] *Overnight Transportation Co*., 322 NLRB 723 (1996) ("The plain language of the Act clearly indicates that the same employees of an employer may be grouped together for purposes of collective bargaining in more than one appropriate unit…it is well-settled that there is more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining."); *Children's Hosp. of San Francisco*, 312 NLRB at 928 ("At the outset, in this regard, it must be noted that Section 9(a) of the Act requires that, in order to be designated as a group of employees' exclusive representative for purposes of collective bargaining, a labor organization must be selected, as such, by a majority of the employees in an appropriate unit and that "there is nothing in the [Act] which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be "appropriate.'…Also, 'the fact that one unit is appropriate does not necessarily mean that all other units are inappropriate.'") (citations omitted).

[163] *ADT I,* 355 NLRB at 1388.

It is not incongruent for the Union to have petitioned to represent a unit consisting of all service employees out of the Janesville facility while at the same time having maintained the appropriateness of the well-established former Rockford Unit. As such, the filing of that petition has no bearing on this Court's analysis and consideration of the merits of Petitioner's request for injunctive relief.

ii. The decertification petition did not privilege Respondent to withdraw recognition from the Union

The record is clear that no former Rockford Unit employees' signatures appear on the decertification petition that Respondent argues demonstrates the Union's loss of majority support in the Rockford Unit.[164] In order to rely on this defective petition to justify its withdrawal of recognition from the Union, Respondent attempts to improperly expand the former Rockford Unit to include the former Madison employees. As there is no evidence that Respondent recognized the Union as the collective-bargaining representative of the former Madison employees at any time, nor that the former Rockford employees and former Madison employees were integrated into a single unit as described above in paragraph II.C.iv., Respondent's ruse must fail.

The evidence is clear that Respondent never considered the Union to be the collective-bargaining representative of the former Madison employees nor did it consider the former Madison employees to be part of the Rockford Unit. At the time the former Madison employees joined the former Rockford Unit employees at the Janesville facility the former Rockford employees outnumbered the former Madison employees and were the majority.[165] Respondent never applied the collective-bargaining agreement to the former Madison employees, nor did it

[164] Tr. 67 – 69, 152 – 153.

[165] Tr. 103 – 104, 444 – 445.

notify the Union of any new hires into the bargaining unit or remit dues to the Union on behalf of any new employees or former Madison employees.[166] Furthermore, there is no evidence that the Union claimed to represent the former Madison employees at any time before or after the relocation to Janesville.

Respondent's Director of Labor Relations, Nixdorf, admitted on cross-examination that Respondent did not consider all the service employees at the Janesville facility to be represented by the Union. He further admitted that Respondent's actions with respect to the Union demonstrated it did not believe the Union represented all the service employees at the Janesville facility.[167] Respondent's reliance on the decertification petition signed only by non-Unit employees to withdraw recognition from the Union was self-serving, disingenuous and unlawful.

iii. The Board's decision in *Johnson Controls, Inc.*, is inapposite to the instant case

Respondent ADT will likely argue that the Board's decision in *Johnson Controls, Inc.*,[168] required the Union to file a petition to re-establish its majority status after receiving the notification of the anticipated withdrawal of recognition. This would be a baseless argument, as *Johnson Controls* is inapposite to the instant case.

Johnson Controls addresses the situation where employees provide an employer with evidence that at least 50% of bargaining unit employees no longer wish to be represented by the union and the union reacquires majority status after the employer's anticipated withdrawal of recognition. The Board held that proof of an incumbent union's actual loss of majority support, if received by an employer within 90 days prior to contract expiration, conclusively rebuts the

[166] Tr. 58, 444.

[167] Tr. 443 – 444.

[168] *Johnson Controls, Inc.,* 368 NLRB No. 20 (2019).

union's presumptive majority status when the contract expires. However, the union may attempt to reestablish that status by filing a petition for a Board election within 45 days from the date the employer gives notice of an anticipatory withdrawal of recognition.[169]

Johnson Controls did not consider the issue at hand in the instant case, which is whether a specific bargaining unit is still a valid unit after a facility relocation. Here, the issue is whether Respondent improperly expanded the bargaining unit so that it could rely on non-Unit employees' signatures on the decertification petition in order to unlawfully withdraw recognition from the Union. None of the former Rockford Unit employees signed the petition. Respondent withdrew recognition from the Union when it did not have valid evidence that at least 50% of the established former Rockford Unit no longer wished to be represented by the Union. Anticipatory withdrawal law under *Johnson Controls* is immaterial here because the purported evidence of loss of support did not come from the existing bargaining unit.[170]

In short, as shown above, the former Rockford Unit maintained its integrity after the facility relocation to Janesville and Respondent has failed to meet its burden of demonstrating compelling circumstances overcoming the parties' significant bargaining history. As its other defenses are without merit, Petitioner has demonstrated a very strong likelihood of success of prevailing on the merits in the administrative proceeding.[171]

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[169] *Johnson Controls, Inc.*, 368 NLRB No. 20.

[170] Nor does *Dodge of Naperville, Inc*., 357 NLRB 2252, 2253 (2012), *enforced,* 796 F.3d 31 (D.C. Cir. 2015) as Respondent may argue, apply to the instant case. *Dodge of Naperville* concerned a failure to engage in effects bargaining before a unit merger, which is not at issue here. Even so, the Board in that case cited to the "compelling circumstances" test set forth in *ADT I*, while cautioning that bargaining history alone is insufficient to establish an appropriate unit.

[171] *See Glasser ex rel. N.L.R.B,* 379 F. App'x at 489.

III. INTERIM RELIEF IS EQUITABLY NECESSARY TO PREVENT IRREPARABLE HARM TO THE EMPLOYEES' STATUTORY RIGHTS AND TO PROTECT THE EFFEICACY OF THE BOARD'S FINAL ORDER

"[I]n the labor field, as in few others, time is crucially important in obtaining relief."[172] Respondent's illegal conduct threatens irreparable harm to the national labor policy encouraging good-faith collective bargaining embodied in Section 1 of the Act, obliterates the employees' right to organize under Section 7 of the Act, and threatens the efficacy of the Board's ultimate remedial order.

"[E]ncouraging the practice and procedure of collective bargaining" is "the policy of the United States[.]"[173] Section 7 of the Act grants employees the right to decide whether they wish "to bargain collectively through representatives of their own choosing . . . ."[174] In this case, the employees exercised that right and freely selected their representative, but Respondent's unlawful actions are thwarting that choice, contrary to the purposes of the Act. As explained below, without timely interim relief, Respondent's withdrawal of recognition and unilateral changes will undermine employees' support for the Union and deprive employees of the benefits of collective bargaining. In this case, Respondent's unilateral grant of significant bonuses to the former Rockford Unit cannot but provoke disaffection from the Union. Over time, without an immediate injunction requiring interim recognition, good-faith bargaining, and rescission of the changes, these harms will be irreparable, and the Board's final remedial bargaining order will be ineffective. Respondent will succeed in permanently depriving its employees of Union representation through its illegal conduct, contrary to the Act's intent.

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[172] *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 (1967).

[173] 29 U.S.C. § 151.

[174] 29 U.S.C. § 157.

Respondent's withdrawal of recognition is likely to irreparably erode employees' support for their chosen representative over time because the Union is unable to protect the employees or affect their working conditions while the case is pending before the Board.[175] The employees predictably will shun the Union because their working conditions will have been virtually unaffected by collective bargaining for several years, and they will have little, if any, reason to support the Union.[176] This lost support for the Union will not be restored by a final Board order in due course. By the time the Board issues its final order, it will be too late; employees will have given up on their union.[177]

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[175] *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 49-50 (1987) (employer's refusal to bargain "'disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions.'") (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944)). *Cf. NLRB v. American Natl. Ins. Co.*, 343 U.S. 395, 402 (1952) ("Enforcement of the obligation to bargain collectively is crucial to the statutory scheme."); *NLRB v. Keystone Steel & Wire*, 653 F.2d 304, 307 (7th Cir. 1981) (when an employer unlawfully ignores the bargaining representative, it impairs "the stability of the bargaining relationship" and "create[s] perceptions of unfairness and of union weakness").

[176] *See Bloedorn*, 276 F.3d at 297-98; *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454-55 (1st Cir. 1990); *Hoffman v. Inn Credible Caterers, Ltd.*.247 F.3d 360.369 (2d Cir. 2001); *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 102 (3d Cir. 2011) (refusal to recognize union "inflicts a particularly potent wound"); *Frye v. Specialty Envelope, Inc.*, 10 F.3d 1221, 1226-27 (6th Cir. 1993); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1362 (9th Cir. 2011) ("the result of an unremedied refusal to bargain with a union, standing alone, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether"); *NLRB v. Irving Ready-Mix, Inc.*, 780 F. Supp. 2d 747, 771 (N.D. Ind. 2011) ("The longer that [the employer] is able to avoid bargaining with the [u]nion, the less likely the [u]nion will be able to organize and represent [the employer's] employees effectively if and when the Board orders [it] to commence bargaining."), *affirmed sub nom. Lineback v. Irving Ready-Mix, Inc.*, 653 F.3d 566 (7th Cir. 2011).

[177] *See Bloedorn*, 276 F.3d at 299; *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1192 (9th Cir. 2011) ("delay in bargaining weakens support for the union, and a Board order cannot remedy this diminished level of support"); *Hoffman*, 247 F.3d at 369 (since employers "can damage employee confidence in

The Union's loss of support, in turn, will make the Board's final bargaining order ineffectual, leading to remedial failure.[178] The Union needs the support of the employees it represents in order to bargain effectively. Without support, the Union has no leverage and is "hard-pressed to secure improvements in wages and benefits at the bargaining table."[179] With a weakened union, a final Board bargaining remedy will be unable to "recreate the original status

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preexisting unions by simply failing to recognize them . . . there is a pressing need to preserve the status quo while the Board's final decision is pending."); *Electrical Workers v. NLRB*, 426 F.2d 1243, 1249 (D.C. Cir. 1970) ("When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees."); *Centro Medico*, 900 F.2d at 454-55 ("there was a very real danger that if [the employer] continued to withhold recognition from the [u]nion, employee support would erode to such an extent that the [u]nion could no longer represent those employees"); *Squillacote v. U.S. Marine Corp.*, 1984 WL 148024, at *4 (E.D. Wis. 1984).

[178] *See Bloedorn*, 276 F.3d at 299 (the longer a union "is kept . . . from working on behalf of . . . employees, the less likely it is to be able to organize and represent those employees effectively if and when the Board orders the company to commence bargaining"); *Chester*, 666 F.3d at 102–103 (interim bargaining order necessary because "[a]n ultimate Board order that [the employer] recognize the Union may be ineffective if the Union has lost significant support"); *Small*, 661 F.3d at 1193 ("[w]ith only limited support . . . the [u]nion will be unable to bargain effectively regardless of the ultimate relief granted by the Board"); *Irving Ready-Mix*, 780 F.Supp.2d at 771–772; *Kinney v. Cook Cnty. Sch. Bus, Inc.*, 2000 WL 748121 at *8–11 (N.D. Ill. 2000).

[179] *Moore-Duncan v. Horizon House Developmental Servs.*, 155 F. Supp. 2d 390, 396 (E.D. Pa. 2001). *See also Duffy Tool & Stamping, L.L.C. v. NLRB*, 233 F.3d 995, 998 (7th Cir. 2000) ("By undermining support for the union, the employer positions himself to stiffen his demands . . . knowing that if the process breaks down the union may be unable to muster enough votes to call a strike."); *Hadsall v. Sunbelt Rentals Inc.*, 2020 WL 4569177, at *5 (E.D. Wis. 2020) ("it is widely accepted that the longer the employer avoids bargaining with the union, the more likely it is that participation in the union will be chilled and that the union will not be able to be effective in its representation"), *appeal pending* 7th Cir. No. 20-2482.

quo with the same relative position of the bargaining parties."[180] In those circumstances, no meaningful, productive good-faith bargaining will occur under the Board's final order.[181] For these reasons, numerous courts, including the Seventh Circuit, have recognized that an employer's unlawful refusal to bargain inherently and predictably causes irreparable harm.[182]

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[180] *Frankl*, 650 F.3d at 1363. *See also Wilson v. Liberty Homes, Inc.*, 500 F. Supp. 1120, 1131 (W.D. Wis. 1980) (interim bargaining order warranted because "in the time it takes for the Board to finally rule . . . support among the truck drivers for the union may have eroded; erosion of support for the union in turn may unfairly diminish the union's bargaining strength if and when respondent is compelled to bargain with it"), *aff'd in rel. part* 1981 WL 17037, at *13-14 (7th Cir. 1981), *vacated as moot and opinion withdrawn from publication as moot*, 1982 WL 31231 (7th Cir. 1982).

[181] *See Electrical Workers*, 426 F.2d at 1249 (employer "may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively"); *Perez v. Noah's Ark Processors, LLC,* 2019 WL 2076793 at *5 (D. Neb. 2019) ("the Board's ultimate remedial action is likely to have little effect if it only results in compelling [the employer] to engage in collective bargaining with a Union that's already lost its base of support").

[182] *See Bloedorn*, 276 F.3d at 297-98 (Director not required to produce independent evidence of irreparable harm where employer refused to recognize union because "the same evidence that establishes the Director's likelihood of proving a violation of the NLRA may provide evidentiary support for a finding of irreparable harm"); *Frankl*, 650 F.3d at 1362 (withdrawal of recognition context; "inferences from the nature of the particular unfair labor practice at issue remain available. For instance, with regard to the central statutory violations likely established here, violations of § 8(a)(5), continuation of that unfair labor practice, failure to bargain in good faith, has long been understood as likely causing an irreparable injury to union representation"); *Small*, 661 F.3d at 1191 ("Given the central importance of collective bargaining to the cause of industrial peace, when the Director establishes a likelihood of success on a failure to bargain in good faith claim, that failure to bargain will likely cause a myriad of irreparable harms."); *U.S. Marine*, 1984 WL 148024, at *4 (irreparable harm inferred where employer unlawfully refused to recognize and bargain with the union).

Respondent will defeat the Union, elude its bargaining obligation, and frustrate the intent of Congress by virtue of its unlawful actions.[183]

Ordering Respondent to bargain with the Union now offers the best chance of preserving the Union's support before it is irrevocably diminished, thereby protecting employees' statutory right to choose representation and preserving the Board's remedial effectiveness.[184]

Loss of support for the Union is not the only irreparable harm caused by Respondent's refusal to bargain in good faith. While Respondent is benefiting from its unlawful refusal to recognize or bargain pending Board litigation, the unit employees contemporaneously and irreparably suffer the loss of the benefits of good-faith collective bargaining and representation by their chosen Union.[185] The benefits of collective bargaining include negotiated improvements in terms and conditions of employment, such as scheduled wage increases or benefits packages. A final Board order is "forward-looking" and will not compensate for the benefits that the Union might have secured through bargaining in the present.[186] The lost benefits of representation also go beyond wages to include such items as job security, safety and health conditions, and the protection of a grievance-arbitration procedure which, because they are non-monetary, cannot be

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[183] *See Sharp v. Tri-State Mechanical, Inc.,* 1995 WL 661101, at *7 (W.D. Wis. 1995) ("[I]t is proper to impose a bargaining order. Anything less would only allow respondent 'to profit from [his] own wrongful refusal to bargain.'") (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969)).

[184] *Scott v. Stephen Dunn*, 241 F.3d 652, 669 (9th Cir. 2001) ("[s]uccessful bargaining could restore the employees' interest in the Union").

[185] *See Wilson*, 500 F. Supp. at 1131 ("the longer respondent is permitted avoid negotiating with the union, the longer the truck drivers will be denied the benefits of a potential collective bargaining agreement. This is an especially important consideration since the benefits the drivers seek are not economic only, but also concern the safety of their working conditions.").

[186] *See Bloedorn,* 276 F.3d at 299; *Small*, 661 F.3d at 1191-92; *Frankl*, 650 F.3d at 1363; *Chester*, 666 F.3d at 103.

made whole by a Board order in due course.[187] The employees are currently suffering the loss of all of these benefits. In addition to Respondent's unilateral changes to wages and benefits, employees have lost their contractual just-cause grievance procedure, Union representation in disciplinary meetings, and any say in Respondent's changes in the terms and conditions of employment. Moreover, the refusal to recognize and bargain has potentially delayed any successor contract.

In contrast to these serious irreparable harms to the employees' rights, the Union's status, and the Board's remedial authority, any harm Respondent might suffer as a result of a temporary injunction "will only last until the Board's final determination."[188] An interim bargaining order under Section 10(j) is not permanent.[189] The order would not compel agreement to any specific term or condition of employment advanced by the Union in negotiations.[190] Rather, it only

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[187] *See U.S. Marine*, 1984 WL 148024, at *4 (citing *Wilson*, 500 F. Supp. at 1131); *Pascarell v. Gitano Group, Inc.*, 730 F. Supp. 616, 625 (D.N.J. 1990); *Asseo v. Centro Medico del Turabo, Inc.*, 1989 WL 130007, at *9 (D.P.R. 1989) ("employees will also lose the benefits of representation, such as health and safety advocacy and grievance representation, which cannot be compensated by a final Board order"), *aff'd*, *Centro Medico* 900 F.2d 445; *Levine v. C & W Mining Co.*, 465 F. Supp. 690, 695 (N.D. Ohio), *aff'd in rel. part* 610 F.2d 432, 436-37 (6th Cir. 1979) ("The value of the right to enjoy the benefits of union representation is immeasurable in dollar terms once it is delayed or lost."); *DeProspero v. House of the Good Samaritan*, 474 F. Supp. 552, 559 (N.D.N.Y. l978). *See generally Scott*, 241 F.3d at 667 ("The value of the right to . . . representation is immeasurable in dollar terms").

[188] *Pan Am. Grain Co.*, 805 F.2d 23, 28 (1st Cir. 1986).

[189] *See Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 40 (2d Cir. 1975) ("there is nothing permanent about any bargaining order . . . particularly an interim order which will last only until the final Board decision"); *U.S. Marine*, 1984 WL 148024, at *4.

[190] *See Wilson*, 500 F. Supp. at 1131 ("[S]ince a bargaining order requires only that respondent bargain, and not that it reach any particular agreement, respondent will not suffer any irreparable harm from such an order.")

requires bargaining with the Union in good faith to an agreement or a bona fide impasse.[191] Any agreement reached between the parties under a Section 10(j) decree can contain a condition subsequent to take into account the possibility of the Board's ultimate refusal to grant a final bargaining order remedy.[192] Also, the costs in terms of time and money spent on collective bargaining are burdens that fall on both parties and do not defeat a request for an interim bargaining order.[193] Additionally, the strength of the Board's case on the merits affects a court's assessment of the relative harms posed by the grant or denial of injunctive relief: the greater a party's prospects of prevailing on the merits, the less compelling a showing of irreparable harm is required.[194] Accordingly, the balance of hardships tips in the Director's favor.

An interim bargaining order will also further the public interest in fostering collective-bargaining to safeguard industrial peace.[195] Additionally, it will serve the public interest in "ensur[ing] that an unfair labor practice will not succeed" because of the long administrative process.[196]

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[191] *See Frankl*, 650 F.3d at 1048 ("When the company is not compelled to do anything except bargain in good faith, the risk from a bargaining order is minimal." (quoting *Small*, 661 F.3d at 1196)); *Scott*, 241 F.3d at 669; *Overstreet v. Thomas Davis Medical Centers, P.C.*, 9 F. Supp. 2d 1162, 1167 (D. Ariz. 1997); *Penello v. United Mine Workers*, 88 F. Supp. 935, 943 (D.D.C. 1950).

[192] *See*, *e.g.*, *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1054 (2d Cir. 1980).

[193] *See Scott*, 241 F.3d at 669.

[194] *Spurlino Materials, LLC*, 546 F.3d at 502 (citing *Bloedorn*, 276 F.3d at 286-87).

[195] *See Bloedorn*, 276 F.3d at 300-01; *Centro Medico*, 900 F.2d at 455 ("If the goal of the labor laws and regulations is to strengthen the bargaining process, then ordering bargaining . . . cannot be contrary to the public interest."). *See also Paulsen v. Remington Lodging & Hospitality, LLC*, 773 F.3d 462, 469 (2d Cir. 2014) ("The principal purpose of a [Section] 10(j) injunction is to guard against harm to the collective bargaining rights of employees.").

[196] *Small*, 661 F.3d at 1197 (quoting *Frankl*, 650 F.3d at 1365-66). *See also Bloedorn*, 276 F.3d at 300 (citing *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902, 906-07 (3d Cir. 1981)); *Harrell*,

In addition to an interim bargaining order, interim rescission of Respondent's unlawful changes in working conditions is necessary to restore an "even playing field" for bargaining.[197] Restoring the unlawfully changed conditions so that the Union will not be forced to "bargain back" the unlawful changes prevents Respondent from benefitting from its unfair bargaining advantage.[198] Unilateral changes necessarily frustrate the statutory objective of establishing working conditions through collective bargaining.[199] Also, interim rescission is necessary to curb the predictable loss of employee support for the Union caused by the adverse unilateral changes in critical terms and conditions, damage that an eventual Board order likely cannot remedy.[200]

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714 F.3d at 557; *Seeler*, 517 F.2d at 39 (the public interest is in "prevent[ing] frustration of the purposes of the Act").

[197] *See Harrell*, 714 F.3d at 557-59; *Squillacote v. Advertisers Mfg. Co.*, 677 F.2d 544, 547 (7th Cir. 1982). *See also Kreisberg v. Healthbridge Mgmt., LLC*, 732 F.3d 131, 143 (2d Cir. 2013), *cert. denied* 135 S. Ct. 869 (2014); *Morio v. N. Am. Soccer League*, 632 F.2d 217, 218 (2d Cir. 1980) (per curiam); *Silverman v. Major League Baseball*, 880 F. Supp. 246, 259 (S.D.N.Y. 1995) (Sotomayor, J.), *aff'd*, 67 F.3d 1054 (2d Cir. 1995). Interim rescission would be upon the request of the Union. *See, e.g.*, *Morio*, 632 F.2d at 640. *See generally Children's Hosp. of San Francisco*, 312 NLRB at 931.

[198] *See Harrell*, 714 F.3d at 558; *Kreisberg*, 732 F.3d at 143 (interim rescission of unilateral changes was necessary to avoid bargaining "in the shadow of work conditions unilaterally imposed" by the employer); *Silverman*, 880 F. Supp. at 259 (interim rescission of unilateral changes appropriate to "salvage some of the important bargaining equality that existed" prior to violations); *Florida-Texas Freight*, 203 NLRB 509, 510 (1973), *enforced*, 489 F.2d 1275 (6th Cir. 1974).

[199] *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *see also Harrell*, 714 F.3d at 557 ("unilateral changes prevent the [u]nion from discussing terms, and therefore 'strike at the heart of the [u]nion's ability to effectively represent the unit employees'").

[200] *See NLRB v. Keystone Steel & Wire,* 653 F.2d at 307 (unlawful unilateral changes "create perceptions of . . . union weakness"); *NLRB v. Hardesty Co.*, 308 F.3d 859, 865 (8th Cir. 2002) ("unilateral action will . . . often send the message to the employees that their union is ineffectual, impotent, and unable to effectively represent them"); *East Bay Automotive Council v. NLRB*, 483 F.3d 628, 634 (9th Cir. 2007) (a unilateral change "minimizes the influence of organized bargaining" and emphasizes to employees "that

The other requested relief is also just and proper. A cease-and-desist order is a standard provision in any Section 10(j) preliminary injunction; it is necessary to restrain Respondent from engaging in future unlawful conduct and assures employees that their rights will be protected.[201] Reading of the Court's order in front of the employees and a representative of the Board is an "effective but *moderate* way to let in a warming wind of information and, more important, reassurance."[202] Relatedly, posting the order during the pendency of the administrative proceedings will further inform and reassure employees of their rights.[203]

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there is no necessity for a collective bargaining agent") (quoting *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)); *Gottschalk v. Piggly Wiggly Midwest, LLC*, 861 F. Supp. 2d 962, 972 (E.D. Wis., 2012).

[201] *Paulsen v. PrimeFlight Aviation Servs., Inc.*, 718 F. App'x 42, 45 (2d Cir. 2017) (summary order); *see also, e.g.*, *Hooks v. Ozburn-Hessey Logistics, LLC*, 775 F. Supp. 2d 1029, 1052 (W.D. Tenn. 2011) (cease-and-desist order appropriate "to prevent irreparable chilling of support for the Union among employees and to protect the NLRB's remedial powers.").

[202] *United Nurses Assocs. of Cal. v. NLRB*, 871 F.3d 767, 788-89 (9th Cir. 2017); *see also Hadsall*, 2020 WL 4569177, at *12; *Norelli v. HTH Corp.*, 699 F. Supp. 2d 1176, 1206-07 (D. Haw. 2010) (ordering reading of court order), *aff'd*, 650 F.3d 1334 (9th Cir. 2011); *Fernbach v. Sprain Brook Manor Rehab, LLC*, 91 F. Supp. 3d 531, 550 (S.D.N.Y. 2015); *Rubin v. Vista del Sol Health Services, Inc*., 2015 WL 306292, at *2 (C.D. Cal. Jan. 22, 2015); *Overstreet v. One Call Locators Ltd*., 46 F. Supp. 3d 918, 932 (D. Ariz. 2014); *Calatrello v. Gen. Die Casters, Inc*., 2011 WL 446685, at *8 (N.D. Ohio Jan. 11, 2011).

[203] *See, e.g.*, *Hadsall*, 2020 WL 4569177, at *12; *Hooks*, 775 F. Supp. 2d at 1054 (ordering posting).

CONCLUSION

In sum, interim relief ensures that Respondent does not profit from its illegal conduct, protects employees' Section 7 rights, safeguards the parties' collective bargaining process, preserves the remedial power of the Board, and effectuates the will of Congress.

Dated: February 12, 2021.

Respectfully submitted,

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EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JENNIFER A. HADSALL, Regional Director
of Region 18 of the National Labor Relations Board,
for and on behalf of the NATIONAL LABOR
RELATIONS BOARD,

Petitioner,

v. Case No. 3:21-cv-00009-JDP

ADT, LLC,

Respondent.

RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION TO PRELIMINARY INJUNCTION UNDER SECTION 10(j) OF THE NLRA

Respondent ADT, LLC ("ADT" or "the Company"), by its attorneys OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., respectfully asserts that injunctive relief should be denied in this matter. As fully discussed below, the Petitioner has failed to carry its burdens of proof of likelihood of success on the merits that traditional remedies will not suffice, that public harm will result absent an injunction, that irreparable harm will occur absent the injunction, and that the harm to be prevented outweighs any irreparable harm to ADT resulting from the granting of an injunction.

Therefore, injunctive relief should be denied and this matter dismissed with prejudice.

PERTINENT FACTS

I. The Union's Certification and Subsequent Bargaining History.

In 1994, International Brotherhood of Teamsters, Local 364 ("the Union") won a representation election involving Company employees working out of a Rockford, Illinois office. (GCX 2).[1] The Board certified the Union as the exclusive bargaining representative for the following unit:

> All full-time and regular part-time installers, technicians and service personnel employed by the Employer ***at its 510 LaFayette Avenue, Rockford, Illinois facility***; but excluding all other office clerical employees, professional employees, guards and supervisors as defined by the Act, and all other employees.

(emphasis added). The Union's certification as representative, therefore, is expressly and explicitly linked to the presence of a physical facility in Rockford, Illinois.

Subsequently, the Company and the Union agreed to a series of successive collective bargaining agreements. (GCX 3-10). The most recent and final collective bargaining agreement was effective by its terms from September 1, 2017 through August 31, 2020. (GCX 3). This agreement and each of its predecessors includes a "recognition clause" reflecting the original certification. (GCX 3) ("The Employer hereby recognizes the Union as the exclusive collective bargaining representative . . . for whom the Union was certified by the National Labor Relations Board on October 24, 1994 in Case # 33-RC-3943."). All relevant "bargaining history" ties directly back to the original certification and its focus on the Rockford facility. (GCX 3-10).

Significantly, and despite many cycles of negotiations, the parties never opted to define the bargaining unit in any terms other than those employed at the Rockford facility. (*See, e.g.*, GCX 3). The contractual relationship is utterly devoid of any bargaining unit definition related to

[1] General Counsel exhibits will be identified as "(GCX __)", the Company's exhibits will be identified as "(RX_)" and citations to the unfair labor practice hearing transcript will be identified as "(Tr. __)."

"geographic area" or "exclusive work jurisdiction." (GCX 3-10). The contract history likewise never defines the bargaining unit in terms of specialized work performed or any other criteria beyond the physical Rockford office. (GCX 3-10).

In this proceeding, the Regional Director asks the Court to refashion the certification/contract history from "whole cloth" and with total disregard for bargaining history. (Petitioner's (Proposed) Findings of Fact and Conclusions of Law (Dkt. 3), p. 4, item 1(g)).

II. Servicing of Northern Illinois Following the Certification.

Due to this bargaining history, the "Rockford unit" was not the only employee group working in the "Rockford area" over multiple decades. (Tr. 72-3). The Rockford group, likewise, has never been limited or confined to work in the Rockford area, the State of Illinois or any other region. Multiple witnesses consistently confirmed these inescapable facts.

Union Assistant Business Manager Larry Rowlett ("Rowlett") explained, "The way ADT works, there is times where, you know, the ***Chicago*** office might come to the ***Rockford*** jurisdiction on occasion. Our ***Rockford*** group might go into ***Madison*** area and do the same for the ***Madison*** ADT unit." (Tr. 72-3) (emphasis added). Former Rockford technician Danny Sissum ("Sissum") acknowledged he "might get sent to ***Iowa***" and "might get sent to ***Beloit, Wisconsin***." (Tr. 120) (emphasis added). Former Rockford technician David Anderson ("Anderson") described working "wherever I was required" including multiple sites in Wisconsin such as "***Janesville***, ***Madison***, ***Fond du Lac***, ***Fort Atkinson***." (Tr. 242)(emphasis added). Anderson further testified:

> Q. And at that time [when both Rockford and Madison offices were open] there were no defined territorial boundaries, were there?
>
> A. There are—***no***.
>
> Q. And there are still no territorial boundaries today, are there?
>
> A. No. ***There are no lines***.

Q. You could end up in Wisconsin some days, right?

A. ***Yes***.

Q. And the Madison folks could end up – the former Madison folks could end up in Illinois?

A. If certified [licensed],[2] ***yes***.

(Tr. 301)(emphasis added). Company witness James Nixdorf likewise confirmed the absence of jurisdictional or geographic boundaries as well as the substantial overlap between multiple employee groups (Rockford, Madison, Chicago, *etc*.). (Tr. 422-4).

III. Pre-Merger Operations.

For many years leading up to the pertinent events, the Company maintained two (2) separate brick-and-mortar operations in Rockford, Illinois and Madison, Wisconsin. (Tr. 114). Each facility contained its own accommodations for service and support personnel. (Tr. 183). Rockford housed its own, separate parts storage and clerical/support staff offices. (Tr. 183). The Madison facility, likewise, contained its own parts and office spaces. (Tr. 183). While the Union represented employees at the Rockford location, the Madison Facility was non-union. (Tr. 393-5).

IV. The Union's Normal Operations.

By its own admission, the Union's normal "coverage area" does not extend into Wisconsin. (Tr. 39). Instead, the Union services nine (9) northwest Illinois counties (including Winnebago, Stephenson, Jo Daviess, Carroll, Lee, Whiteside and DeKalb). (Tr. 39). Janesville, Wisconsin, therefore, stands "out of [the union's] area" of standard operations. (Tr. 56).

[2] The state of Illinois requires a certification for technicians to operate in the state. Former Madison Facility employees had such certifications so that they could operate beyond the scope of Wisconsin.

V. The Company Relocates/Consolidates for Lawful, Legitimate Business Reasons.

In February 2019, the Company's real estate department examined the potential consolidation of the Rockford and Madison locations into a new facility located in Janesville, Wisconsin. (RX 5). Janesville represents the "half way point" between the two legacy Company offices. (RX 5). In addition to substantial savings and efficiency gains, the new Janesville office allowed the Company to "easily be able to service all zip codes from a central location." (RX 5, p. 1; Tr. 408).

The Company announced the move in a May 22, 2019, communication to all Rockford and Madison personnel (both technicians and sales/support staff). (GCX 11). On July 23, 2019, the Company sent a second memorandum to all Rockford and Madison personnel regarding the impending Janesville relocation/consolidation. (RX 3).

There is no claim (or even suggestion) that the Janesville consolidation was unlawful or otherwise improper. There is no claim (or even suggestion) that the move had anything to do with the Union, unions generally or any considerations other than legitimate business efficiencies.

Significantly, the Union never demanded or requested "effects bargaining" over the closure of Rockford or the move to Janesville. (Tr. 71-2; 413-5). Had the Union done so, the Company stood ready and willing to fulfill any and all bargaining obligations. (Tr. 413-5; 417).

VI. The Rockford Facility Closes and Employees Move to Janesville.

The Janesville operation did not become fully-operational or fully-staffed overnight. Rather, the move to Janesville involved a transition period.

In approximately September 2019, the Rockford facility permanently closed and its personnel relocated to a temporary Janesville location. (Tr. 75). Five (5) Rockford technicians and

certain support staff worked out of the temporary facility until approximately the start of 2020. (Tr. 101). The Madison office remained operational during this period.

At the beginning of 2020, the permanent Janesville location opened and those relocating from Madison (both service technicians and support personnel) joined those who had been working from the temporary space. (Tr. 103).

VII. The Rockford and Madison Groups Fully Integrate into Janesville.

Once the permanent Janesville facility opened, the former Rockford and Madison service technicians worked from the same location, performed the same work, engaged with the same support team, and answered to an identical supervisory chain-of-command. (Tr. 73-4, 81, 117, 123, 192-3, 201). Not surprisingly, the new Janesville facility became the hub (pre-pandemic) for any employee workplace discussions regarding discipline, pay disputes or operations. (Tr. 202, 290-1).

Despite the government's substantial efforts to obfuscate the facts, the former Rockford witnesses admitted that they saw and interacted with the former Madison group "more regularly" and at an "increased" level once both groups arrived in Janesville. (Tr. 140, 307). The two formerly separate groups performed identical work, drove the same trucks, used the same tools/equipment and reported to the same managers. (Tr. 307). They held themselves out to the public with the same uniforms as a single unit. (Tr. 311). And, of course, they continued to work without regard to any artificial or imagined geographic boundary or jurisdiction. (Tr. 307).

The "face-to-face" interaction between the Madison and Rockford groups also spiked once the Janesville facility opened. The technicians attended the same "welcome breakfast" with other support personnel in early 2020. (Tr. 143-4). The two formerly separate groups attended "live" training sessions together, in the same room. (Tr. 143-4). All former Madison and Rockford

employees physically attended new product sessions together in Janesville. (Tr. 144). In short, all operational and social gatherings of any sort (for both technicians and support staff) became fully integrated upon Janesville's opening. (Tr. 199).

On this point, the government disingenuously argues that the former Rockford and Madison groups only "had about two in-person training sessions at the new facility." (Petitioner's Memorandum of Law in Support of its Petition for Preliminary Injunction Under Section 10(j) of the Act (Dkt. 14), p. 12) . As an evidentiary matter, this assertion fails on the record. As a practical matter, the government's argument attempts to use the Covid-19 pandemic to detract from the clear integration of the Rockford and Madison groups. The government's own witnesses confirmed that the increased "face-to-face" interactions between the two (2) groups stalled solely because the Janesville facility "has pretty much been closed since the virus began." (Tr. 145). Even after the pandemic began, however, all Janesville service technicians (both former Rockford and Madison) operated as a single integrated group performing identical functions. Upon the "shift to virtual," both groups continued to attend the same meetings as one entity. (Tr. 304). But for the virus, the government's "Rockford" witnesses would expect workplace matters to be discussed in Janesville and further admitted that the "ex-Madison technicians" share the same expectation. (Tr. 309).

VIII. The Union Seeks to Represent All Janesville Technicians.

On May 8, 2020, the Union filed a representation petition with Region 18 of the NLRB. (GCX 12). The petition sought a "wall-to-wall" Janesville unit including all "service technicians, lead install technicians, lead service technicians, service technician trainees [and] install technician trainees" working out of Janesville. (GCX 12). The total "number of employees" sought by the Union amounted to eleven (11), only five (5) of whom formerly worked from Rockford. (GCX

12). The petition signed by the Union notes: "Willful false statements on this petition can by punished by fine and imprisonment." (GCX 12).

When a union files a petition, the NLRB requires employers to post a "Notice to Employees" alerting the employees to the filing. For this reason (among others), it was no secret to the employees that the Union was making a claim to "all Janesville technicians." (Tr. 198, 443).

Leading up to the petition, the Union conducted an investigation into its level of support in Janesville. (Tr. 312). This effort included individual meetings with at least some portion of the Janesville workforce. (Tr. 312).

Bradley Williams ("Williams"), the Union's organizer, agreed that "Generally, where employees perform the same work, in the same place, that typically constitute[s] an appropriate bargaining unit." (Tr. 392). When the Union petitioned for Janesville, it estimated that the eleven (11) voters included "six (6) members of ours" and "five (5) on the non-signatory side" (referring to the former Madison workers or new hires). (Tr. 393, 395). Put another way, the Union projected that it enjoyed majority support when filing the petition. (Tr. 393, 395). In fact, Williams' log includes a May 4, 2020 entry noting that he had "confirmed our 6 to 5 majority." (RX 1).

Williams "election projection" proved erroneous. (RX 1). On May 15, 2020, Williams made the following log entry:

> ADT shifted employee [redacted] to Brookfield ***making RC petition a 5 on 5 campaign***. We withdrew our petition ***at this time***. We will approach the non-signatory branch of this unit and see if we can grab one member for our side. Working with SOC Laskonius on the ***next phase of this***.

(RX 1)(emphasis added).

To recap and put plainly what the government is attempting so desperately to conceal, the state of affairs between the Janesville technicians and the Union as of May 15, 2020 involves the following undisputed facts:

1. The former Rockford (union) and Madison (non-union) service technicians are clearly working as a single, integrated unit out of the now shared Janesville facility.
2. The combined Janesville unit, as evidenced by the Union's own petition and inescapable reality, constitutes the only viable "appropriate bargaining unit" given the merger and integration.
3. Cognizant of this reality, the Union has filed a representation petition seeking the entire facility but under the mistaken belief that it had any election "in the bag."
4. The existence of the petition and the Union's claim on all of Janesville is clearly known to all employees— including the former Rockford employees, the former Madison employees and new hires.
5. After making public its intention to claim all of Janesville, the Union withdrew the petition due to a political miscalculation. The Union cannot "un-ring the bell," however, as employees are aware of its activities.
6. The Union has not "given up" on claiming to represent all of Janesville but, instead, was actively seeking "one more vote" and approaching "non-signatories" (that is, former Madison employees or new hires) for support.

Up to this juncture, there is no claim or suggestion that the Company has committed any unlawful act with respect to the Janesville facility or any Janesville-based employee.

IX. Other Activities Surrounding the Petition.

Having been "put in play" by the Union's petition, certain Janesville employees apparently took action. Government witness and former Rockford employee/Union member Anderson candidly admitted that he holds a "vested interest" in the Union's continued presence in Janesville.

(Tr. 288). So motivated, Anderson caught wind of a "decertification effort" and took it upon himself to conduct some "on-line research." (Tr. 298).

Anderson then, of his own accord, initiated a conversation with a former Madison employee whom Anderson suspected of having involvement in the decertification effort. (Tr. 298). Anderson acknowledged he was not acting at the behest of the Company. (Tr. 292-3). Anderson's investigation ultimately confirmed that the Company was not "behind" the decertification push. (Tr. 293-4).

Union organizer Williams was similarly aware that the decertification effort flowed directly from the Union's botched petition, and not from any Company action/influence. Williams' log includes an entry dated September 15, 2020: "Spoke with [redacted] he stated the move to decert was tech motivated he wouldn't say which tech but they all signed ***did not come from management. He says no replacement yet for [redacted] but interviews have been done***." (RX 1, p. 2) (emphasis added). The Union's own document establishes that the Company had nothing to do with the Janesville employees' union sentiments. (RX 1, p. 2). Williams' reference to a "replacement," moreover, confirms the Union at all times was still seeking the "missing vote" needed to claim all of Janesville. (RX 1, p. 2).

X. The Decertification Petition.

Within a week (judging by the signatures) of the Union's "withdrawal" of its petition and while the Union's attempt to find "one more vote" at Janesville was ongoing, certain Janesville employees engaged in a decertification effort. (GCX 14). Between May 20, 2020 and June 4, 2020, six (6) Janesville technicians signed the decertification petition. (GCX 14). This number represented the majority of the Janesville service workforce. (Tr. 431).

Nixdorf, the Company's Director of Labor Relations, reviewed the petition and determined that its signatures were in fact authentic. (Tr. 431; RX 2). Nixdorf further recognized that the signatures constituted a majority. (Tr. 432).

As a result, Nixdorf forwarded a June 22, 2020, letter to the Union alerting it to the decertification. (GCX 15). Notably, Nixdorf's letter ***did not*** immediately withdraw recognition. (GCX 15). Instead and consistent with applicable NLRB precedent, Nixdorf wrote: "The current collective bargaining agreement is set to expire on August 31, 2020. Absent credible objective evidence the union maintains support of the majority of employees in the bargaining unit in Janesville, WI, ADT will withdraw recognition ***at the expiration of such agreement***." In other words, the Company's June 22, 2020, letter put the Union on notice of the need to establish majority support within the applicable legal window. Only at the expiration of that window (absent a showing of required majority status), would the Company withdraw recognition. *Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019) (if an employer has announced its intent to withdraw recognition, the union may attempt to reestablish majority status by filing a representation petition within 45 days from the date the employer gives anticipatory notice of withdrawal of recognition).

The Union failed to follow Board precedent under *Johnson Controls, Inc.*, to establish majority support and, instead, these proceedings ensued.

XI. June 22, 2020 to August 31, 2020.

As noted above, the Union had full and ample lawful opportunity to establish majority status at any time between June 22 and August 31, 2020. It failed to do so. Instead, after a prolonged period and with approximately two (2) weeks remaining prior to the labor contract's expiration, the Union filed its first unfair labor practice charge. That charge led to these

proceedings and the Regional Director's absurd bureaucratic contortions seeking to maintain a minority union in a clearly inappropriate bargaining unit.

OVERVIEW OF THE REGIONAL DIRECTOR'S LEGAL POSITION

In the interest of clarity and before addressing the government's specific contentions, an overview of the fundamental legal standards compared to the government's position seems appropriate.

In order to prevail in this matter, the NLRB must establish that the legacy Rockford bargaining unit "maintained its integrity" notwithstanding the Janesville consolidation and despite its now shared interests with other Janesville technicians doing identical work in the same place. Phrased differently, the government must make a threshold showing that an "ex-Rockford only" group constitutes ***at least*** "an appropriate bargaining unit" (but, not necessarily "the most appropriate bargaining unit"). *See, e.g., Overnite Transportation Co.*, 322 NLRB 723, 723-4 (1996). The Regional Director dedicates substantial ink emphasizing Respondent's burden to "establish compelling circumstances" necessary to "overcome bargaining history." (Dkt. 14, p. 24). That burden, however, does not kick in unless and until the Regional Director satisfies the statutory mandate that a majority-selected collective bargaining representative relates to a "unit appropriate for such [collective bargaining purposes]." *See* 29 U.S.C. § 159**.** Failure to satisfy this basic, mandatory statutory requirement ends the inquiry without resort to an analysis of bargaining history or compelling circumstances.

The Board has long held single-site bargaining units (such as all employees working out of Janesville) presumptively appropriate. *See, e.g., J&L Plate, Inc.*, 310 NLRB 429 (1993). The presumption recognizes that employees within the same facility typically share a "community of

interests" sufficient to "justify their mutual inclusion in a single bargaining unit" for purposes of collective bargaining. *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 610 (1991).

"Gerrymandering" or splitting up employees who share the same workplace and perform the same functions presents a significant threat to collective bargaining. *PCC Structurals*, 365 NLRB No. 160 at *6 (Dec. 15, 2017)(employees' interest must be "sufficiently distinct" from those excluded from unit to ensure that "bargaining units do not become arbitrary, irrational or 'fractured'—that is, composed of gerrymandered groups of employees whose interests are insufficiently distinct from those of other employees to constitute that group a separate appropriate unit."). While bargaining history has significance, it cannot (standing alone) justify illogical or misguided division of employees who otherwise share a community of interest. *See, e.g., Turner Industries Group, Inc.*, 374 NLRB 428, 430 (2007)(the weight given to a prior history of collective bargaining is "substantial" but not "conclusive"); *see also Crown Zellerbach Corp*., 246 NLRB 202, 203 (1979)(the Board "will not adhere to the historical bargaining unit in situations where that unit does not 'conform reasonably well to other standards of appropriateness.'"). In other words, even a substantial bargaining history does not obviate the statutory mandate of an "appropriate" bargaining unit. *See* 29 U.S.C. § 159**.**

In a small number of cases involving unique circumstances, the Board has "re-written" contractual union recognition clauses in order to maintain a historical bargaining unit's viability. The Board's authority to simply "revise contracts" or "impose its own terms" is not without substantial controversy. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)(one of the fundamental policies of the Act is freedom of contract and the Act does not permit the Board to compel agreement between the parties). The Regional Director here asks the Court to take the controversial step of "re-drawing" the parties' historical contractual agreement to suit the

government's objectives. (Dkt. 3, p. 4, item I(g) (asking Court to revise the current unit description from one tied to the "Rockford facility" and, by judicial edict, adopt a definition based upon those "who are regularly assigned to work in the service territory of Respondent's former Rockford, Illinois facility.").

Even if the Board (or the Court) properly wields the ability to amend private contracts, it is noteworthy that the Board historically has exercised that right only on exceedingly rare occasions involving facts wholly absent in this matter. For instance, the Board has embarked on contract amendment where a subset of employees at a single facility had highly specialized skill and performed corollary work justifying a finding of a unique and separate unit. *Comar, Inc*., 339 NLRB 903 (2003). Similarly, the Board has relied on clearly-defined, contractually specified "work jurisdiction" clauses to justify such revisions. *ADT Security Services*, 355 NLRB 1388 (2010), *enfd.* 689 F.3d 628 (6th Cir. 2012). Finally, an employer's failure to engage in required effects bargaining that might have resulted in sufficiently distinct employment terms has been deemed sufficient to permit "gerrymandering" of employees doing the same work out of the same facility. *Dodge of Naperville v. NLRB*, 739 F.3d 31, 40-1 (D.C. Cir. 2015)(permitting post-consolidation legacy union to remain due to employer's failure to satisfy effects bargaining obligation).

In these highly rare circumstances, however, the Board and the Courts exercise great caution so as to not unduly intrude upon the freedom of contract and to avoid the absurd results associated with illogical gerrymandering of employees who share a common workplace and duties. *See Dodge of Naperville*, 739 F.39 at 40-1 (instructively noting that permitting a legacy unionized workforce to exist side-by-side with non-union personnel performing similar work "gives us

pause" and "is a tougher call" and "our decision is limited to these particular facts" and "it may turn out that [the employer's] withdrawal of recognition was simply premature").

ANALYSIS

I. The Former Rockford Employees Cannot Constitute a "Stand Alone" Unit.

Contrary to the Regional Director's confused position, the test here is ***not*** whether certain aspects of the former Rockford group's employment terms remained unchanged after the Janesville consolidation. (*See, e.g.*, Dkt. 14, p. 20)(suggesting continuing "to perform the same work in the same geographic area under largely unchanged terms and conditions of employment" somehow justifies a gerrymandered unit within a shared facility). Instead, the Regional Director must establish that the ex-Rockford technicians' working conditions maintained separate "integrity from" or "remained distinct from" other employees working from the Janesville facility. *See, e.g., NLRB v. ADT Security Services*, 689 F.3d 628, 635 (6th Cir. 2012). The Regional Director has not and cannot meet this burden.

The former Rockford and Madison technicians "do the exact same thing" with respect to the installation and servicing of security systems. (Tr. 73-5, 208-9). They perform this work out of the same location. (Tr. 81). They drive the same trucks, and wear the same uniforms. (Tr. 74, 311). They hold themselves out to the public in identical fashion. (Tr. 311). They share the same supervisors and communicate with those supervisors multiple times per day. (Tr. 74, 81, 115, 117, 201, 237). Both pre and post-pandemic, they attend the same operations, product and training sessions. (Tr. 79-80, 143-5, 195-6). They interact with one other and that interaction increased (pandemic noted) upon Janesville's opening. (Tr. 140). They share, rely upon and interact with the same Janesville-based support staff. (Tr. 183-5, 192, 303). Tellingly and unlike the pre-merger situation, both the former Rockford and Madison employees are aware of promotions, demotions

and departures involving their fellow Janesville employees—whereas before they were only aware of such events involving employees at their assigned (Rockford or Madison) location. (Tr. 189-90). They share the same required licensure for work performed in Illinois. (Tr. 420-1; RX 6). They all expect that workplace issues will be discussed and adjudicated out of the Janesville facility. (Tr. 202, 290-1). Indeed, the government largely concedes (as it must) all of these realities. (Dkt. 14, p. 24)(no dispute employees do the same thing under same supervision under same roof).

II. The Government's Precedent Is Inapposite.

Fully aware that the Janesville technicians share an overwhelming community of interest so as to constitute the only viable appropriate unit, the government attempts to pigeon hole these facts into a readily distinguishable case. The Regional Director boldly proclaims that *ADT Security Services* "controls the instant case." (herein referred to as "*ADT*") Contrary to this pronouncement, any similarity between that case and the facts present here ends with the case title.

In *ADT*, the relevant bargaining history involved a labor contract that explicitly defined the bargaining unit's "work jurisdiction." 355 NLRB at 1397 ("The collective bargaining agreement refers to the Kalamazoo 'service territory,' ***jurisdiction over which the union sought to maintain pursuant to the provision in the contract that provided for notification if employees not assigned to Kalamazoo were sent to work in that territory***.")(emphasis added). The contractual boundary remained in tact both before and after the consolidation of the Kalamazoo employees with the another employee group. *Id.* at 1388 ("The previous collective bargaining agreement referred to the Kalamazoo 'service territory,' and, even after the closure of the Kalamazoo facility, the Kalamazoo employees continued to be assigned work in that territory."). Put another way, the Kalamazoo union had an established, historical and contractually-defined "exclusive claim" to a particular geographic area.

On this basis, the Board (with Court approval) saw fit to amend the contract/certification because doing so merely codified the "boundary lines" ***that the Company and the Union themselves*** had already agreed upon and specifically defined. ADT, 689 F.3d at 636 (Board merely "adopted same methods and distinctions" (*i.e.*, the clear work jurisdiction clause) that the parties themselves had created).

No such "exclusive jurisdiction" has ever existed in this case. The "Rockford group" works in Illinois, Wisconsin and as far out as Iowa or Minnesota. Employees from the Chicago office or other locations likewise service the supposed "Rockford area." The former Madison technicians, both pre and post-merger, hold the licenses necessary to perform security work in Illinois, and have performed work in all regions. (Tr. 72-3, 89, 209, 242, 288, 301). Indeed, the Regional Director concedes the total absence of "defined boundaries serviced by the Rockford facility." (Dkt. 14, p. 9).

A. The Court Should Not Amend the Certification/Contract Based on a Wholly Non-Descript, "*De Facto*" Work Jurisdiction Theory.

Notwithstanding the clear difference between *ADT* and this matter, the Regional Director urges the Court to impose a "*de facto* defined Rockford territory." (Dkt. 14, p. 20). She explains, "That the distinct geographic work area for the former Rockford employees is defined de facto, ***and not contractually***, and that the Union was not notified of others working in the Rockford territory, are ***not material differences***." (Dkt. 14, p. 28-9)(emphasis added). In point of fact, the differences are not only material, they are decisive.

Once again, the original NLRB certification of the Union is expressly tied to a "Rockford facility." No such facility currently exists, having been replaced with the Janesville operation. Similarly, the Rockford unit has never enjoyed any jurisdictional or exclusive geographic claim.

Unlike the facts in *ADT*, neither the Board nor this Court may rely upon an existing contractual definition of "jurisdiction" or "geographic control" should it accept the Regional Director's invitation to amend a private collective-bargaining agreement. *Compare ADT*, 689 F.3d at 636 (even post-consolidation, Company distinguished between service areas and ***assigned only*** Kalamazoo servicemen to work in a ***specific*** subdivision of the Kalamazoo service territory as delineated by a color-coded map)(emphasis added).

Here, the Regional Director has not and cannot establish any similarly clear "jurisdictional boundary" that might possibly preserve the Rockford unit's separate integrity. This failing, and the associated realities, is fatal to the government's case.

The record establishes that multiple employee groups routinely entered the imaginary "Rockford service territory" over many contract cycles. Supposed "Rockford work" was performed not only by the non-union Madison folks (who, not coincidentally, have always held an Illinois license), but also by other unionized locations based in Chicago and elsewhere. By the same token, the "Rockford employees" worked in states such as Iowa, Wisconsin and Minnesota notwithstanding the imaginary "*de facto* territory."

These undisputed facts raise questions the Regional Director simply has not (and cannot answer). Is the Board or the Court now to amend and police a contract in a fashion that forbids licensed former Madison technicians from performing work in Illinois? Is the (unionized) Chicago facility now magically "prohibited" from entering a "Rockford territory" which the government is to create without any historical or contractual guidance or basis? May the former Rockford employees refuse to report to the Janesville office as "outside their jurisdictional area?" May they decline the "non-Rockford work" (Wisconsin, Iowa, Minnesota, *etc.*) under the Regional Director's contorted theory? If "Rockford work" is insufficient to maintain employment, are they to be laid off

rather than supplemented with work in other states? Finally, when newly-created "Rockford territory" bargaining unit suffers attrition or a decrease in numbers, are those positions to be filled or shall the bargaining unit simply dissipate over time?[3] On what basis? This is but a preview of a myriad of unresolvable questions to flow from the Regional Director's misguided attempt to gerrymander a minority union back into existence.

Beyond this "preview" lurk more fundamental problems the Regional Director blithely ignores. Like Mary Shelley's *Frankenstein*, neither the Regional Director nor Board precedent provide any clue as to how the gerrymandered monster is to be handled once created.

The entire system of collective bargaining is premised on good faith negotiations backed up by the threat (and, occasional exercise) of economic weapons to enforce a party's legitimate demands. A successful union strike creates leverage through employee unanimity and cohesion. Here, the Regional Director seeks to create an "ex-Rockford only" group which, under her theory, would literally work in the same place as the employees who would replace their labor in the event of a "ex-Rockford only" strike. The hardly creates an advantageous bargaining climate for the Union and, essentially, leaves it with little or no leverage whatsoever.

On the flip side, the employer's primary economic weapon is the "lockout" whereby bargaining unit employees re not permitted to work until they accede to employer demands. To avoid favoritism and maintain union cohesion, an employer must (by law) visit the effects of a lockout on an entire bargaining unit, it may not exempt "its favorites" or "anti-union" employees. *Electrical Workers Local 15 v. NLRB*, 429 F.3d 651, 662 (7th Cir. 2005), *cert denied* 127 S.Ct. 42 (2006)("partial lockout" unlawful where, during course of union strike certain employees crossed

[3] In *ADT*, of course, the historical jurisdictional boundary solves the question of attrition and replacement because the union had an exclusive jurisdictional claim to the "Kalamazoo service territory." In that situation, therefore, the Company must replenish/maintain the bargaining unit or cede work in that area to a competitor.

picket line and were permitted to continue work once strike converted to lockout as exempting those employees was "inherently destructive" to union's representational role). Under the Regional Director's skewed view, nothing would prohibit the Company from locking out the "ex-Rockford only" unit during the course of bargaining to enforce lawful and legitimate demands. Unlike the normal lockout scenario where the employer must suffer the loss of its entire normal workforce for the duration of the action, here Janesville would remain operational under the Regional Director's theory. The Company would still enjoy the services of the "non-union" former Madison/new hires, etc. who the Regional Director has "gerrymandered out of" the obviously appropriate "all Janesville" unit. (GCX 12).

Put simply, the Regional Director is not "protecting the public's interest in collective bargaining," but rather turning the entire system upside down and destroying its foundations (employees with the same interest in the same place should be in the same unit, union's economic leverage depends on strike participation and impact on employer site, etc.). The Court should not permit this erosion simply to appease the Regional Director's short-sighted and misguided attempt to save a minority union.

B. The Government's Remaining Arguments Cannot Sustain the Complaint.

Having disposed of the General Counsel's lynchpin "geographic distinctness" argument, two (2) other contentions remain.

The government incorrectly claims a lack of evidence regarding the comparative wage rates of the former Madison and Rockford groups. (Dkt. 14, p. 24). The undisputed evidence establishes that both groups shared the same wage rates both before and after the opening of Janesville. (Tr. 425-7; RX 7). This fact, obviously, further differentiates this matter from the Regional Director's cited precedent. *Compare ADT* 689 F.3d at 636 (noting that even after

consolidation the "Kalamazoo servicemen [received] a lower hourly rate and piece rate based on a discernable labor market in the Kalamazoo service territory") *and* 355 NLRB at 1388 (Kalamazoo technicians paid less because "both the location of their work and the resulting wage rates remain distinct").

Finally, Moreover, the government's witnesses, with collective experience at the Rockford facility of approximately eight (8) years, mustered a whopping total of four (4) examples of "call out" occurrences. Obviously, these rare occurrences fall woefully short of overcoming the otherwise overwhelming community of interest shared by the former Rockford and Madison technicians. (Tr. 96, 128, 249).

APPLICATION OF SECTION 10(J) STANDARDS

The Seventh Circuit holds that a Section 10(j) injunction is an "extraordinary remedy." *NLRB v. Electro-Voice, Inc.*, 83 F. 3d 1559, 1566 (7th Cir. 1996), *citing Szabo v. P*I*E Nationwide, Inc.*, 878 F.2d 207, 209 (7th Cir. 1989). This extraordinary remedy is to be granted only where absolutely necessary.

> Section 10(j) relief should be granted "only in those situations in which the effective enforcement of the NLRA is threatened by the delays inherent in the NLRB dispute resolution process. Beyond the extraordinary nature of the relief sought, on appeal, the Director must show that the district court abused its discretion in finding that injunctive relief is "just and proper."

The Regional Director may not obtain injunctive relief unless she carries the required burdens of proof on each of the following: 1) likelihood of success on the merits; 2) traditional remedies would be "seriously deficient;" 3) public harm would result absent an injunction; and 4) irreparable harm would occur absent the injunction, and that this harm outweighs any irreparable harm to the employer. *Id*. at 1567-8. The government's case here, as thoroughly exposed by the administrative record, fails on all fronts.

As to likelihood of success on the merits, the unfair labor practice hearing record forecloses the possibility. Indeed, and at the risk of belaboring the obvious, a strong injunction case does not resort to urging a Court to simply ignore testimony offered on cross-examination. (Dkt. 14, p. 26)(noting that the same government witness's admissions on cross-examination "***is undercut***" by his direct testimony). A case with likely success does not rely on "*de facto*" theories. Traditional remedies suffice to remedy any harm, and the public interest is not served by the "gerrymandering" invited by the Regional Director as her contorted theory undermines the very foundations of collective bargaining (private agreement, strike/lockout, employee cohesion and mutual interest). Finally, no irreparable harm exists to the Union here, particularly when compared to the substantial harm that would be inflicted upon the Company should the Court indulge the Regional Director's strained legal theories. Moreover, at minimum, the guidance needed to comply with the Regional Director's desired result here should be fashioned by the Board, and not a Court, with respect to any newly-created jurisdictional lines, subsequent hiring and a myriad of other unanswered questions. *See Kaynard v. Mego Corp*., 633 F.2d 1026, 1035 (2d Cir. 1980)("the issuance of a Section 10(j) injunction diminishes whatever incentive for speed the General Counsel and the charging union might otherwise have had, since a considerable portion of the desired relief has already been obtained. Moreover, in the interval between the grant of an injunction and final adjudication by the Board, the rights of the parties will have been ***determined by a court rather than by the expert agency established by Congress.***")(emphasis added).

One final point bears emphasis. The relevant chain of events here, including the decertification signed by the majority of the Janesville workforce, traces directly to the Union's own political misjudgments and miscalculations. A "just and proper" adjudication simply should not attempt to visit the consequences of those mistakes on the Company, particularly given that

the Company indisputably played no role in the Union's petition or the employee's decertification response.

CONCLUSION

For the foregoing reasons, ADT respectfully requests that the Regional Director's request for the extraordinary remedy of a preliminary injunction be denied and this matter dismissed with prejudice.

Dated this 26th day of February, 2021.

/s/ Timothy C. Kamin
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EXHIBIT C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

JENNIFER A. HADSALL, Regional Director of Region 18 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner v. ADT, LLC, Respondent	Civil No. 3:21-cv-9

PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION TO PRELIMINARY INJUNCTION UNDER SECTION 10(j) OF THE NLRA

The Petitioner, Jennifer A. Hadsall, Regional Director for Region 18 of the National Labor Relations Board (the NLRB or Board), for and on behalf of the Board, respectfully asserts that the Board's request for injunctive relief in this matter should be granted. Respondent's Memorandum of Law in Opposition to Preliminary Injunction Under Section 10(j) of the NLRA (Respondent's Memorandum) mischaracterizes the applicable law and facts in this matter. Petitioner has demonstrated its likelihood of success on the merits and that injunctive relief is just and proper.

I. The Standard and Case Precedent to be Applied in the Instant Matter

A. The Standard of Review for Injunctive Relief

It its Memorandum, Respondent ignores the limited role of district courts in assessing the likelihood of success in a Section 10(j) proceeding. As stated in Petitioner's Memorandum of Law in Support of Its Petition for Preliminary Injunction Under Section 10(j) of the Act

(Petitioner's Memorandum), the standard of review is briefly repeated here.[1] By showing that Petitioner's chances are "better than negligible,"[2] she makes a threshold showing of a likelihood of success, and thus the Court should determine whether "the Director has 'some chance' of succeeding on the merits."[3] The Court is to base its decision on the administrative record. It is confined by Section 10(j) of the Act to inquire only as to "the *probability* that the Director will prevail"[4] and confers no jurisdiction to pass on the ultimate merits of the allegations.[5] The Court should not resolve credibility conflicts in the evidence[6] and "owe[s] the [Petitioner] a favorable construction of the evidence, much as we would if he were a plaintiff appealing the grant of summary judgment of the defendant."[7] Moreover, the Court must be "hospitable" to Petitioner's view of the law, given the Board's expertise in matters of labor relations.[8]

B. The Administrative Law Judge is Bound by Board Precedent

When evaluating the Petitioner's likelihood of success on the merits of her case, the Court should be mindful that the Board's administrative law judges must follow and apply Board precedent, notwithstanding contrary decisions by courts of appeals, unless and until the Board precedent is overruled by the Supreme Court or the Board itself.[9] Judges are also bound to

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[1] Petitioner's Memorandum is cited herein as "Pet." Respondent's Memorandum is cited herein as "Resp."
[2] *Lineback v. Spurlino Materials, LLC,* 546 F.3d 491, 502 (7th Cir. 2008).
[3] *Harrell v. American Red Cross*, 714 F.3d 553, 556 (7th Cir. 2013).
[4] *Bloedorn v. Francisco Foods, Inc.,* 276 F.3d 270, 287 (7th Cir. 2001) (emphasis in original; *citing NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570 (7th Cir. 1996).
[5] *Spurlino Materials*, 546 F.3d at 502; *Electro-Voice*, *Inc.,* 83 F.3d at 1567.
[6] *Electro-Voice*, *Inc.,* 83 F.3d at 1570–71.
[7] *Bloedorn,* 276 F.3d at 287.
[8] *Id.*; *Spurlino Materials,* 546 F.3d at 502.
[9] *See, e.g.*, *Western Cab Co*., 365 NLRB No. 78, slip op. at 1 n. 4 (2017); and *Pathmark Stores, Inc.*, 342 NLRB 378 n. 1 (2004). *See also D.L. Baker, Inc.*, 351 NLRB 515, 529 n. 42 (2007) (summarizing the reasons for the Board's nonacquiescence policy).

follow particular Board findings in a prior case, where appropriate, under the doctrine of collateral estoppel.[10]

II. The Established Bargaining Unit Retains Its Separate and Distinct Identity

The legal rubric set forth in *ADT* (referred to herein as *ADT I*) is controlling in the instant case and clearly puts the burden on Respondent to establish compelling circumstances sufficient to overcome the parties' lengthy bargaining history.[11] In its Memorandum, Respondent attempts to shift the burden to the Petitioner to establish the appropriateness of the Rockford Unit. While rejecting Respondent's attempts at burden-shifting, Petitioner notes that the record evidence at the administrative hearing definitively establishes that the Rockford Unit maintained its integrity and separate and distinct identity and is an appropriate unit.

The Board recognized the Rockford Unit as an appropriate unit in its October 21, 1994, Certification of Representative:

> As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots have been cast for LOCAL 364, 1NTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees ***in the following appropriate unit***:
>
> All full-time and regular part-time installers, technicians and service personnel employed by the Employer at its 510 LaFayette Avenue, Rockford, Illinois facility; but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act, and all other employees. (emphasis added) (GCX 2).

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[10] *See Great Lakes Chemical Corp.,* 300 NLRB 1024, 1024–1025, n. 3 (1990), *enfd.* 967 F.2d 624 (D.C. Cir. 1992). *See also Planned Building Services, Inc.*, 347 NLRB 670 n. 2 (2006), overruled on other grounds *Pressroom Cleaners*, 361 NLRB 643 (2014); and *Stark Electric, Inc.*, 327 NLRB 518 n. 1 (1999) (judge properly relied, at least in part, on findings in prior Board decisions involving the same respondent to find animus).

[11] *ADT*, 355 NLRB 1388 (2010), *enfd*. 689 F.3d 628 (6th Cir. 2012).

Since the 1994 certification, and up until September 2020, Respondent itself acknowledged the appropriateness of the Rockford Unit through its recognition of the Union as the exclusive collective-bargaining representative of the unit and its negotiation of at least eight collective-bargaining agreements covering the unit. Even after the consolidation of the former Rockford employees and the former Madison employees out of the Janesville facility in the fall of 2020, Respondent continued to acknowledge the appropriateness of the Rockford Unit through its on-going recognition of the Union and application of contractual terms to the unit employees, a critical fact completely ignored in Respondent's Memorandum.

In addition to the historical recognition of the appropriateness of the Rockford Unit, other factors that establish the on-going appropriateness of the unit include the continued application of the collective-bargaining agreement to the unit employees post-consolidation, the distinct geographic territories covered by the former Rockford employees and the former Madison employees, and the limited and sporadic interaction between the two groups of employees.[12]

The Sixth Circuit decision enforcing *ADT I*, cited by Respondent in its Memorandum, does not specifically designate a burden to the NLRB's General Counsel to show the maintenance of a separate identity for the bargaining unit.[13] Rather, the Sixth Circuit applies community of interest factors as a standard of evaluating the factual situation.[14] As noted above

[12] The lack of meaningful interaction between the former Rockford employees and the former Madison employees comes as no surprise. As detailed below in Section III, both groups of employees are dispatched from home and are only scheduled to report to the Janesville facility once a week to pick up parts. Unlike employees who work side-by-side in a manufacturing plant, the employees here do not come into regular contact with each other.

[13] 689 F.3d 628.

[14] As the Sixth Circuit examined community of interest factors in *ADT I*, it observed factual situations that parallel the instant case, including separate on-call lists, different geographic work areas, and wages. Notably, the instant case has even more distinct terms given the additional factor of the continued application of the collective-bargaining agreement to the Rockford Unit

in the discussion on the standard of review, the administrative law judge in this proceeding is bound by Board precedent. Even so, it is worth noting that the Sixth Circuit *affirmed* the appropriateness of the existing Kalamazoo bargaining unit, noting the deference to be afforded the Board in its selection of an appropriate bargaining unit.[15] Furthermore, the Circuit Court agreed that Respondent was required to establish compelling circumstances overcoming the parties' lengthy bargaining history:

> Where an existing bargaining unit is present, "[t]his fact alone suggests the appropriateness of a separate bargaining unit," and the Board has required "compelling circumstances" to overcome the significance of the bargaining history.[16] *(citations omitted)*.

The law is clear that the burden to overcome the significance of the parties' lengthy collective bargaining relationship rests with Respondent. The historical bargaining unit is an appropriate unit as demonstrated by the record evidence, including Respondent's own continued recognition of the Rockford Unit.

III. Respondent Mischaracterizes the Level of Interaction Between Technicians

In its memorandum, Respondent stated the face-to-face interaction between the former Rockford and Madison groups "spiked" once the Janesville facility opened. Petitioner takes issue with Respondent's characterization of the record evidence and points the Court to her Memorandum at pages 12 – 14 and 22 – 24, which contain cites to the transcript from the administrative proceeding demonstrating that any increase in interaction after the consolidation in Janesville was negligible. We also remind the Court that the technicians are dispatched *from their homes*, work out of their own company-provided vans at the customer location, and for the

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employees. In short, the community of interest in the instant case is even stronger than that found in *ADT I*.

[15] *Id*. at 630, 634.

[16] 689 F.3d at 634

vast majority of the time, work on their own. Indeed, the former Rockford technicians only go to the Janesville facility sporadically for training and once a week to replenish supplies *on separate days* from the other technicians. In addition to over-inflating the level of interaction among the technicians, Respondent completely ignores, possibly to distract this Court, that it continued to apply the collective-bargaining agreement *exclusively* to the former Rockford technicians *for almost a year.*

Finally, Respondent's accusation that Petitioner is using the Covid-19 pandemic to detract from the integration of the Rockford and Madison groups is not only false and inflammatory, it mischaracterizes witness testimony and seeks to conceal Respondent's failure to present any evidence demonstrating that the pandemic impacted the lack of meaningful interaction between the groups.

The uncontroverted record evidence establishes that the former Rockford and Madison groups had only two in-person training sessions at the new facility. This is a fact established by record evidence that cannot be ignored. One witness, employee and shop steward Danny Sissum testified that there were no other instances in which the two groups had face-to-face interaction, explaining that the building had been closed since the virus began. (Tr. 145). Respondent cannot extrapolate from this isolated statement that increased in-person interaction stalled solely because of the pandemic, especially as the Janesville consolidation occurred at least half a year before the start of the pandemic, giving Respondent ample time to bring the two groups of employees together on a more frequent or regular basis.

In asserting that upon the shift to virtual, both groups continued to attend the same meetings as one entity ignores the witness testimony that these meetings are attended by all facilities under General Manager Gary Talma's management, including those in Milwaukee,

Minnesota and possibly Iowa, thus detracting from any argument that these meetings establish any sort of integration between the former Rockford employees and the former Madison employees. (Resp. 7; Tr. 143). Similarly, employee David Anderson's testimony that absent Covid, he would expect workplace discussions to take place in the Janesville facility simply has no bearing on whether the former Rockford employees and former Madison employees are an integrated group, and he cannot know what the expectations of the former Madison employees are in this regard. (Resp. 7, Tr. 309).

Respondent did not present any witnesses to testify that the lack of integration was caused by the Covid-19 pandemic nor did it present any documentary evidence in this regard. Its belated and unfounded attempts to fashion an explanation for the lack of integration between the former Rockford employees and the former Madison employees, post-consolidation, are meritless and must be disregarded.

IV. ***Johnson Controls*** **is Inapposite and the Union's Petition is Irrelevant**

Respondent argues the Union failed to follow Board precedent under *Johnson Controls, Inc.*[17] However, the Board in *Johnson Controls* did not consider the issue present in this case, namely whether the former Rockford bargaining unit remained a valid unit after the move to Janesville. In this case, Respondent relied on a decertification petition signed *solely* by non-Rockford Unit employees in the *improperly expanded* bargaining unit to unlawfully withdraw recognition from the Union. The Board in *Johnson Controls,* unequivocally provides a union with the option of filing an unfair labor practice charge alleging that "the number of valid

[17] *Johnson Controls, Inc.*, 368 NLRB No. 20 (2019) (setting the union's ability to rebut the presumption of loss of majority support by filing a petition for a Board election within 45 days from the date the employer provides notice of an anticipatory withdrawal of recognition).

signatures on the disaffection petition fails to establish loss of majority status."[18] Indeed, the Board detailed the exact avenue of which the Union in this case availed itself:

> Under current law, an employer is not obligated to provide the union with a copy of its disaffection evidence at the time it withdraws recognition anticipatorily. We do not change that precedent**.** We believe that a union on the receiving end of an anticipatory withdrawal may readily acquire sufficient relevant information from its stewards and/or other pro-union employees to determine whether an unfair labor practice charge would be warranted. *The sufficiency of the employer's disaffection evidence will, of course, be evaluated by the Board's regional office in its investigation of any unfair labor practice charge that may be filed regarding the employer's anticipatory withdrawal and refusal to bargain for a successor contract.*[19] (emphasis added).

As noted above, the Union availed itself of the procedure specified by the Board in the *Johnson Controls* decision by filing the related unfair labor practice charges. The Union thereafter presented Petitioner with evidence that Respondent failed to acquire a majority of signatures from employees in the correct unit, failed to demonstrate compelling circumstances sufficient to modify the bargaining unit upon relocation to the Janesville facility, and made unlawful unilateral changes upon its withdrawal of recognition. Based on such evidence, the Petitioner determined to initiate the administrative proceedings before a Board administrative law judge as well as file for temporary injunction before the Western District. Simply put, the *Johnson Controls* case is inapposite, it does not require the Union to reestablish majority support, and does not, in any way, sanction Respondent's unlawful withdrawal of recognition from the Union for which Petitioner is seeking an injunction.

Respondent also suggests the Union's withdrawn May 2020 petition has bearing on the matter before this Court. It does not. First, the only matter before the Court is whether Petitioner

[18] *Id*., slip op. at 9.
[19] *Id.,* slip op. at 9 n. 42.

has presented evidence necessary to establish that the injunction should issue pursuant to Section 10(j) of the Act.[20] Second, the fact that the Union attempted to organize a larger unit is immaterial. The Act itself is devoid of language requiring a unit be *the* only appropriate or *the* most appropriate one. Indeed, the Board has interpreted the statute to require only that the unit be *an* appropriate unit.[21] The Rockford Unit remains an appropriate unit for the reasons discussed above. Accordingly, that is the end of the inquiry, and whether another appropriate unit consisting of all Janesville technicians may exist is of completely no moment. Lastly, Respondent asserts, without support in the record, that there is ongoing organizing at the Janesville facility. The notes Respondent refer to are from May 2020. (RX 1). No evidence regarding organizing since that time period is contained in the administrative record. However, even if there were evidence in the record supporting ongoing organizing by the Union, it would be of no relevance with respect to the question before the Board. Nor should it be of any consequence with respect to the question before this Court.

V. The Modification of the Bargaining Unit Description in the Proposed Order is Appropriate

The original NLRB certification describes the Rockford Unit as consisting of "[a]ll full-time and regular part-time installers, technicians and service personnel employed by the Employer at its 510 LaFayette Avenue, Rockford, Illinois facility." The Petitioner's Proposed Order Granting Petition for Injunction Under Section 10(j) of the National Labor Relations Act modifies this unit description and requests that this Court temporarily enjoin Respondent from refusing to recognize and bargain with the Union in a unit consisting of "[a]ll full-time and

[20] See Section I.A above for discussion on the standard of review.
[21] *Fish Plant Servs.,* 311 NLRB 1294, 1297 (1993); *citing Morand Bros. Beverage. Co.*, 91 NLRB 409, 418 (1950), *enfd*. 190 F.2d 576 (7th Cir. 1951))

regular part-time installers, technicians, and service personnel employed by the Employer at its Janesville, Wisconsin facility, who are regularly assigned to work in the service territory of the Employer's former Rockford, Illinois facility." The Proposed Order is guided by the modified unit description set forth in the case relied on by Respondent in its Memorandum, the Sixth Circuit enforcement of *ADT I*, as described further below.

In its Memorandum, Respondent argues that the Court should not amend the Board certification or the parties' contract based on Petitioner's work jurisdiction theory.[22] Respondent argues that the original Board certification is expressly tied to the Rockford facility, which no longer exists, and poses a number of baseless hypotheticals about the effect of any remedy of its unfair withdrawal of recognition.[23] To be clear, Petitioner does not ask this Court to decide the merits of the case or remedy any of Respondent's unfair labor practices, including by amendment of the Board certification. Such remedies are within the purview of the Board with potential enforcement by the Circuit Courts if necessary, and any objections to the remedies that the Board might fashion down the road if the Petitioner prevails at the administrative hearing are both premature and brought in the wrong forum. Petitioner comes before this Court to seek only a temporary injunction of Respondent's unfair labor practices, i.e. a temporary return to the

[22] Petitioner respectfully refers this Court to her Memorandum for a detailed discussion on the de facto boundaries of the Rockford service area in which the former Rockford Unit employees worked.

[23] Respondent's Memorandum poses these rhetorical and hypothetical questions as if merely raising them forecloses injunctive relief. (Resp. 18-19). The concern that Respondent professes for the Union's imagined lack of bargaining leverage in its hypothetical strike and lock-out situations should be viewed with skepticism given Respondent's persistence in its unlawful attempts to rid itself of the Union. Regardless, such questions are not before the Court. Furthermore, Respondent has provided no evidence that any disruption occurred from the status quo that existed for almost a year prior to its unlawful withdrawal of recognition, i.e. a represented group of employees working under a collective-bargaining agreement and an unrepresented group of employees being dispatched out of the same facility to customer locations in the field.

status quo that existed prior to Respondent's unlawful actions, during the pendency of the Board's proceedings.

In any event, it is well-within the Board's authority to fashion remedies for unfair labor practices, including, if necessary, the modification of the collective-bargaining unit description.[24] The Sixth Circuit enforcement of *ADT I*, cited by Respondent, upholds the Board's authority in this regard.[25] In *ADT I*, the Kalamazoo unit was defined as "[a]ll full-time and part-time servicemen employed by the Employer at its Kalamazoo, Michigan facility (unit exclusions omitted)." In its Order remedying Respondent's unlawful withdrawal of recognition, the Board redefined the bargaining unit as "[a]ll full-time and regular part-time servicemen regularly assigned to work in the Kalamazoo service territory (unit exclusions omitted)."[26]

In its exceptions to the Board's Order in *ADT I*, as it does here, Respondent argued that the modification of the unit description was beyond the Board's power. The Sixth Circuit, however, disagreed and noted that the Board's modification of the unit description "merely

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[24] *See, e.g.*, *In re Comar*; 339 NLRB 903, 904 (2003), *enfd*. 111 Fed.Appx. 1 (D.C. Cir. 2004).
[25] Respondent has presented no Board cases supporting its assertion that the Board is hesitant to modify unit descriptions to address changed circumstances in an unfair labor practice context. Rather, Respondents cites to more generic law addressing contract modification. Further, in its Memorandum, on page 14, Respondent mischaracterizes the DC Circuit's comments in *Dodge of Naperville*, 796 F.3d 31, 40 - 41 (D.C. Cir. 2015), that permitting a legacy unionized workforce to exist side-by-side with non-union personnel performing similar work gave it pause and was a tougher call, and that its decision was limited to those particular facts and that it might turn out that the employer's withdrawal of recognition was simply premature. Respondent cites these comments as support for its unsubstantiated contention that in the highly rare circumstances the Board or Courts amend private contracts, they "exercise great caution so as not to unduly intrude upon the freedom of contract and to avoid the absurd results associated with illogical gerrymandering of employees who share a common workplace and duties." However, the DC Circuit in *Dodge* was not considering the issue of whether the Board has the authority to modify a unit description. Instead, the Court's discussion focused on the hypothetical question of whether, had the respondent engaged in lawful effects bargaining, the union would have negotiated different terms and conditions of employment that would have maintained the distinctiveness of the historical unit.
[26] *ADT,* 355 NLRB at 1389.

reflects the reality that those employees are no longer employed at the Kalamazoo facility" and that modification was within the Board's power and discretion and appropriately flowed from the record evidence regarding the distinctions Respondent used to assign work, including geographic area, and pay to its employees.[27]

Similarly, here, the modified unit description in Petitioner's Proposed Order reflects the reality that the unit employees are no longer employed at the Rockford facility but continue to work under the same processes and in the same Rockford service area. The modification is reasoned and appropriate. Should the Court be troubled by the modification of the unit description, Petitioner suggests that a unit description consisting of "all full-time and regular part-time installers, technicians and service personnel formerly employed by the Employer at its Rockford, Illinois facility" would suffice for purposes of the temporary injunction. If Petitioner ultimately prevails at the administrative hearing, the Board can modify the certified unit description as it deems appropriate.

VI. Injunctive Relief is Just and Proper

As more thoroughly discussed in Petitioner's Memorandum, injunctive relief is just and proper. (Pet. 36 – 44). Respondent has not presented any defenses demonstrating that it would be harmed by a temporary return to the status quo that existed prior to its unfair labor practices.

In its Memorandum, Respondent made no mention of its unilateral changes to the Rockford unit employees' terms and conditions of employment, and Petitioner assumes that Respondent concedes that no harm would result from a temporary recission of these changes, pending the Board's administrative proceedings, if requested by the Union.

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[27] 689 F.3d at 635; *See also In re Comar*, 339 NLRB at 904 (requiring employer to continue to bargain with representative of relocated employees and describing the unit in terms of those "performing the work that was formerly done" at the previous plant)

Nor would harm result from Respondent being required to recognize and bargain with the Union as it did prior to September 1, 2020. As noted above, the parties lived with the post-Janesville consolidation status quo for almost a year prior to the unlawful withdrawal of recognition and Respondent has presented no evidence of harm that resulted from its maintenance of a represented unit and non-represented personnel working out of the same facility.[28] Furthermore, the record evidence demonstrates that a return to the status quo that existed prior to September 2020 will not result in any change to the former Rockford unit employees' work areas or processes.

Petitioner has demonstrated the necessity of injunctive relief. Respondent has failed to present any evidence that such relief would not be just and proper. As such, Petitioner respectfully requests that a temporary injunction, requiring Respondent to cease its unlawful conduct, including its withdrawal of recognition of the Union, and to recognize and affirmatively bargain with the Union as laid out in Petitioner's Proposed Order, be granted.

[28] In other words, Respondent has already carried on its business for approximately a year in what it terms a "gerrymandered" situation with no record evidence of any harm it sustained during this period.

VII. Conclusion

As Petitioner has demonstrated a likelihood of success on the merits and that injunctive relief would be just and proper, she requests that this Court grant expedited consideration to this petition, consistent with 28 U.S.C. § 1657(a) and the remedial purposes of Section 10(j) of the Act. 29 U.S.C § 160(j).

Dated: March 5, 2021.

Respectfully submitted,

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EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JENNIFER A. HADSALL, Regional Director of Region 18 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner v. ADT, LLC, Respondent	Civil No. 3:21-cv-9

(PROPOSED) FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came to be heard upon the Petition of Jennifer A. Hadsall, Regional Director of Region 18 of the National Labor Relations Board (Board), for a preliminary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended (Act), 29 U.S.C. § 160(j), pending the final disposition of the matters involved pending before the Board, and upon the issuance of the Order to Show Cause why injunctive relief should not be granted as requested in the Petition. The Court has fully considered the Petition, the evidence and the arguments of counsel, and upon the entire record, the Court makes the following:

I. FINDINGS OF FACT

1. Petitioner is Regional Director of Region 18 of the Board, an agency of the United States and files this Petition for and on behalf of the Board.

2. At all material times, Respondent has been a corporation with an office and place of business in Janesville, Wisconsin (Respondent's facility), and has been engaged in the

business of installation and service of residential and commercial security systems within this judicial district.

3. The International Brotherhood of Electrical Workers, Local Union No. 364, AFL-CIO (the Union), pursuant to the provisions of the Act, filed the following charges with the Board alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of the below-specified sections of the Act.

Case Number	Date Filed	Section of the Act
18-CA-264654	August 14, 2020	8(a)(1) and (5) (29 U.S.C. § 158(a)(1), (5))
18-CA-266951	October 1, 2020	8(a)(1) and (5) (29 U.S.C. § 158(a)(1), (5))

4. On October 23, 2020, following a field investigation during which all parties had an opportunity to submit evidence, Petitioner, acting on behalf of the General Counsel for the Board pursuant to authority delegated to Petitioner, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, pursuant to Section 10(b) of the Act in Cases 18-CA-264654 and 18-CA-266951, alleging that Respondent engaged in, and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. 29 U.S.C. §§ 160(b) and 158(a)(1), (5).

5. There is a substantial likelihood that Petitioner will, in the underlying administrative proceeding in Board Cases 18-CA-264654 and 18-CA-266951, establish that:

a. As referenced in paragraph 2, at all material times, Respondent has been a corporation with an office and place of business in Janesville, Wisconsin (Respondent's facility),

and has been engaged in the business of installation and service of residential and commercial security systems.

b. Annually, Respondent, in conducting its business operations described above in paragraph 5(a), derived gross revenues in excess of $500,000 from the sale and service of retail alarm systems.

c. During the same period described above in subparagraph 5(b), Respondent, in conducting its operations described above in paragraph 5(a), purchased and received at its Janesville, Wisconsin, facility goods valued in excess of $5,000 directly from points outside the State of Wisconsin.

d. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. 29 U.S.C § 152(2), (6), (7).

e. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act. 29 U.S.C. § 152(5).

f. The individuals listed below are supervisors of Respondent within the meaning of Section 2(11) of the Act and held the positions listed next to their names at all material times. 29 U.S.C. § 152(11).

Name	**Job Title**
James Nixdorf	Director of Labor Relations
Matt Ides	Team Manager High Volume Install
Shawn Bell	General Manager Sales
Gary Talma	General Operations Manager

g. The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. 29 U.S.C. § 159(b):

> All full-time and regular part-time installers, technicians and service personnel employed by Employer at its Janesville, Wisconsin facility, who are regularly assigned to work in the service territory of Respondent's former Rockford, Illinois facility; but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act, and all other employees.

h. At all material times since about October 21, 1994, Respondent has recognized the Union as the exclusive collective-bargaining representative of the Unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from September 1, 2017 to August 31, 2020 (the Agreement).

i. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

j. About August 2019, Respondent closed its Rockford, Illinois, facility and transferred the Unit to Respondent's newly created facility in Janesville, Wisconsin.

k. About August 2019, Respondent closed its Madison, Wisconsin, facility and transferred the unrepresented employees from that facility (the Madison employees) to Respondent's newly created facility in Janesville, Wisconsin.

l. At all material times since August 2019, Respondent continued to treat the Unit as separate and distinct from the Madison employees in terms of wages, hours, and working conditions.

m. On June 22, 2020, Respondent, by its Director of Labor Relations James Nixdorf, in writing, informed the Union that it planned to withdraw recognition of the Union as the

exclusive collective-bargaining representative of the Unit after the Agreement expired on August 30, 2020.

n. On about September 1, 2020, Respondent withdrew recognition of the Union as the exclusive collective-bargaining representative of the Unit.

o. About September 2020, Respondent:

i. Changed the wages for the Unit;

ii. Changed how overtime is earned for the Unit;

iii. Changed the manner in which the Unit accrues and uses paid time off;

iv. Made the Unit eligible for its bonus system offered to unrepresented employees; and

v. Made additional changes to the terms and conditions of employment of the Unit that are currently unknown to the General Counsel.

p. The subjects set forth above in paragraphs 5(o)(i) – (v) relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

q. Respondent engaged in the conduct described above in paragraphs 5(o)(i) – (v) without prior notice to the Union and/or without affording the Union an opportunity to bargain with Respondent with respect to this conduct.

6. By the acts and conduct set forth above there is a substantial likelihood that Petitioner will establish in the underlying administrative proceeding before the Board that Respondent failed and refused, and continues to fail and refuse to recognize and bargain

collectively with the Union as the collective-bargaining representative of its employees in violation of Sections 8(a)(1) and (5) of the Act, 29 U.S.C § 158(a)(1), (5); and that by this conduct Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1), (5), and affecting commerce within the meaning of Section 2(6) and (7) of the Act, 29 U.S.C. § 152(6), (7).

7. Unless the interim relief requested is granted and Respondent is enjoined and restrained from engaging in the unfair labor practices set forth above, a serious flouting of the Act will continue with the result that enforcement of important provisions of the Act and of public policy will be thwarted because any final remedy by the Board will be insufficient to fully remedy the alleged unfair labor practices and will be unable to restore the *status quo ante*. Respondent's unlawful conduct has a clear and natural tendency to undermine the Union's strength and the Board's remedial powers. Unless injunctive relief requiring recognition of the Union and the rescinding, upon request by the Union, of unilateral changes, is immediately obtained, it can be fairly anticipated that employees will permanently and irreversibly lose the benefits of collective bargaining and the exercise of their statutory rights for the entire period required for Board adjudication, a harm which cannot be remedied in due course by the Board. Such harm clearly outweighs any harm Respondent will suffer if the requested injunctive relief is granted. Further, it may be fairly anticipated that, unless enjoined, Respondent will continue the acts and conduct described above or repeat similar acts and conduct in violation of Section 8(a)(1) and (5) of the Act. 29 U.S.C. § 158(a)(1), (5).

8. It is essential, appropriate, just and proper, for the purposes of effectuating the policies of the Act, and in accordance with the provisions of Section 10(j), 29 U.S.C. § 106(j), that pending final disposition of the matters before the Board, Respondent be enjoined and

restrained from the commission of the acts and conduct set forth in the Order Granting Petition for Injunction Under Section 10(j) of the Act of the National Labor Relations Act in this case.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of this proceeding and, under Section 10(j) of the Act, is empowered to grant injunctive relief. 29 U.S.C. § 160(j).

2. There is substantial likelihood that Petitioner will, in the underlying administrative proceeding in Cases 18-CA-264654 and 18-CA-266951 establish that:

a. The Union is a labor organization within the meaning of Section 2(5) of the Act. 29 U.S.C. § 152(5).

b. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. 29 U.S.C. § 152(6), (7).

c. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and a continuation of these practices will impair the policies of the Act, as set forth in Section 1(b) of the Act. 29 U.S.C. §§ 158(a)(1), (5); 152(6), (7); 151(b).

3. To preserve the issues for the orderly determination as provided in the Act, it is appropriate, just and proper, that pending the final disposition of the matters pending before the Board, Respondent, its officers, representatives, agents, servants, employees, and all members and persons acting in concert or participation with them, be enjoined as set forth in the Order Granting Petition for Injunction Under Section 10(j) of the National Labor Relations Act.

Entered: , 2021

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U.S. District Court Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of March, 2021, the foregoing **RESPONDENT ADT'S POST HEARING BRIEF** was filed electronically as a .pdf document *via* the NLRB's E-filing system and transmitted *via* email to:

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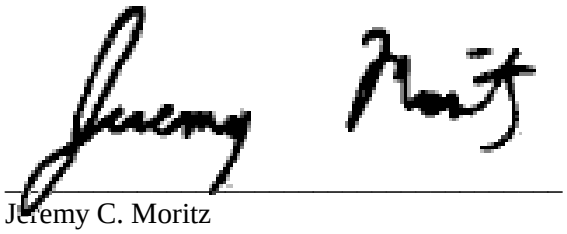

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